

No. **82 5834**

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

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SUPREME COURT U.S.

WALTER JUNIOR BLAIR,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

On Petition for a Writ of Certiorari to the Missouri Supreme Court, en Banc.

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether it was a violation of the cruel and unusual punishment provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to fail to submit to the jury in a prosecution for capital murder, which is intentional murder, an instruction upon first degree murder, which is felony murder, when there was sufficient evidence to support a conviction of first degree murder and when capital murder's requisite intent to kill may not be supplied by the felony-murder doctrine and even though the jury was instructed upon intentional second degree murder?

2. Whether the Missouri Supreme Court's decision in petitioner's case and in State v. Baker, 636 S.W.2d 902 (Mo. banc 1982), relied upon in petitioner's case, that there is no such cruel and unusual punishment and due process violation conflicts with this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980)?

3. Whether the Missouri Supreme Court's decision in petitioner's case and in State v. Baker, 636 S.W.2d 902 (Mo. banc 1982), relied upon in petitioner's case, that first degree murder is not a lesser-included offense of capital murder is an unforeseen judicial construction of §556.046.1(2), RSMo 1978, defining lesser included offenses as those "specifically denominated by statute as a lesser degree of the offense charged," that operates, when applied retroactively, as the equivalent of an ex post facto law, prohibited by the Due Process Clause of the Fourteenth Amendment and §10 of Article I of the Constitution?

4. Whether the Missouri Supreme Court's affirmation of petitioner's sentence of death and conviction of capital murder, committed on August 19, 1979, even though an instruction upon first degree murder which was supported by the evidence was not submitted to the jury, violates the Equal Protection Clause of the Fourteenth Amendment, when that Court reversed in State v. Fuhr, 626 S.W.2d 379 (Mo. 1982) a sentence of life imprisonment without probation or parole for fifty years and conviction of capital murder, committed on February 6, 1980, for failure to submit such a first degree murder instruction?

5. Whether permitting the jury, in determining whether an existing aggravating circumstance is sufficient to warrant the imposition of death, to consider all of the evidence relating to the murder of Kathy Jo Allen, insofar as it included that petitioner had been arrested for an unrelated murder and confined in the penitentiary, resulted in the arbitrary and capricious imposition of the death penalty, in violation of the cruel and unusual punishment provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, when the record of prior arrests and confinements has not been authorized as an aggravating circumstance or as a reason for finding that an existing aggravating circumstance is sufficient to warrant the imposition of death?

6. Whether the Missouri Supreme Court so broadly and vaguely construed the aggravating circumstance that the killing was committed for the purpose of interfering with a lawful custody in a place of lawful confinement as to result in, under the evidence of the killing in petitioner's case and as lawful custody has been construed to mean present custody, the arbitrary and capricious imposition of the death penalty, in violation of the cruel and unusual provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment of the Constitution?

7. Whether the sentence of death must be reversed because of the broad and vague construction of the aggravating circumstance that the killing was committed for the purpose of interfering with a lawful custody in a lawful place of confinement, even though the jury found three, other aggravating circumstances to exist?

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WALTER JUNIOR BLAIR,

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On Petition for a Writ of Certiorari to the Missouri Supreme Court, en Banc.

PETITION FOR CERTIORARI

Walter Junior Blair, petitioner herein, respectfully requests that a writ of certiorari issue to review the judgment of the Missouri Supreme Court, en Banc, in the case styled "State of Missouri vs. Walter Junior Blair, No. 62782."

OPINION

The opinion of the Missouri Supreme Court, en Banc, in the case styled "State of Missouri vs. Walter Junior Blair, No. 62782," the case for which the writ of certiorari is being sought, was filed on August 31, 1982 and may be found in the Appendix at page 1. (References to the Appendix will hereafter be cited as A.____.) It recently has been published at State v. Blair, 638 S.W.2d 739 (Mo. banc 1982).

JURISDICTIONAL STATEMENT

In "State of Missouri vs. Walter Junior Blair, No. 62782," the opinion of the Missouri Supreme Court, en Banc, was filed on August 31, 1982. The opinion affirmed Blair's sentence of death, §565.008.1, RSMo 1978, and conviction of capital murder, §565.001, RSMo 1978. The opinion may be found at A.1. Blair's timely Motion for Rehearing, which may be found at A.29, was overruled by the Missouri Supreme Court, en Banc, on October 7, 1982. The order overruling the motion may be found at A.42. Blair's Motion for Stay of Execution and his Supplemental Motion for Stay of Execution, which may be found at A.38 and A.40, directed to the Missouri Supreme Court, en Banc, was overruled by that Court on October 7, 1982.

The order overruling the motions may be found at A.42. Blair's Application for Stay of Execution of a Sentence of Death (appendices omitted), which may be found at A.43, directed to the Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States and Circuit Justice of the Court of Appeals, Eighth Circuit, was sustained by the Justice on October 14, 1982. The order sustaining the motion may be found at A.49.

This petition has been filed within sixty days after the rendering of the final judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, §10, Eighth Amendment, and Fourteenth Amendment, are set forth at A.50.

STATUTES INVOLVED

Sections 559.010, 559.020, and 556.220, RSMo 1969, are set forth at A.51. Section 559.005 and 559.007, RSMo Supp. 1975, are set forth at A.51. Sections 556.046.1(2), 565.001, 565.003, 565.004, and 565.008.1, RSMo 1978, are set forth at A.51-52. Sections 491.050, 557.036.1, 565.006.2, 565.012.1, 565.012.2, and 565.012.3, RSMo Supp. 1982 are set forth at A.52-54.

STATEMENT OF THE CASE

Walter Junior Blair, petitioner herein, was charged by indictment with the capital murder of Kathy Jo Allen, §565.001, RSMo 1978, punishable by death or life imprisonment without probation or parole for fifty years, §565.008.1, RSMo 1978.

At the determination of guilt proceeding, evidence was adduced by the State supporting two theories of guilt -- one that petitioner intentionally killed Kathy Jo Allen for money so that she could not testify in a rape trial and another that petitioner killed her when she grabbed his gun as he was attempting to hold her incommunicado throughout the course of the rape trial. Larry Jackson was arrested and charged with the rape of Kathy Jo Allen and was confined in the custody of the Jackson County Jail on that charge and on charges of the first degree murder, second degree robbery and armed criminal action of Jerry Willard Han prior to trial. While in jail, Jackson offered petitioner, who was in jail on an unrelated charge, \$2,000 to

kill Allen to keep her from testifying. After petitioner was released on bond from the jail, he kept in contact with Jackson, who raised his offer to \$6,000, and also contacted Jackson's family.

During the early morning hours of Sunday, August 19, 1979, petitioner removed the screen to the bedroom window of Allen's apartment and went inside. Petitioner found Allen and her boyfriend, Robert Kienzle, asleep on a mattress in the living room. He took money from Kienzle's wallet and his watch and diamond ring. When Kienzle and Allen awoke, petitioner announced that he was just there to rob them and that he was not there to hurt or kill anyone. When petitioner left the apartment, he announced that he was taking Allen with him to act as his driver and that she would be back in seven to ten minutes.

Kathy Jo Allen's body, shot from close range in the head, chest and wrist, nude from the waste up, and bearing abrasions and lacerations consistent with being struck on the head by a brick, was found at 6:30 A.M. in a vacant lot.

Petitioner was arrested and confessed orally, in writing and on a video tape. Petitioner admitted that he killed Kathy Jo Allen and that he was hired by Larry Jackson, but claimed that he only intended to hold Allen in an abandoned house throughout the course of Jackson's rape trial and that he shot her only when she grabbed his gun. Petitioner also admitted that he previously had been arrested for an unrelated murder and confined in the penitentiary. Petitioner objected to the admission into evidence of this portion of his confession. The objection may be found in the Transcript on Appeal at page 1808. (References to the Transcript on Appeal will hereafter be cited as Tr. __). Other evidence of guilt -- including petitioner's receipt of \$1,000 from Jackson's mother upon his showing of Allen's driver's license to Jackson's family -- was also adduced.

Petitioner testified. His theory of defense was that he was at home when the murder occurred, that one of the State's witnesses committed the murder, and that his confessions were false and had been coerced by threats and promises by police officers.

The issue of guilt was submitted to the jury upon instructions for capital murder, intentional second degree murder and

manslaughter. Under the Missouri law in effect at the time of petitioner's trial, petitioner was not required to request an instruction upon any lesser-included offense or to object to any matter concerning the instructions. The jury returned a verdict of guilty of capital murder.

At the determination of punishment proceeding, the only evidence introduced was the State's proof of petitioner's prior convictions of assault with intent to rob with malice aforethought and attempted second degree burglary. The issue of punishment was submitted to the jury upon an instruction submitting four statutory aggravating circumstances, including that the murder of Kathy Jo Allen was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson, and the aggravating circumstance otherwise authorized by law of petitioner's record of prior criminal convictions. The issue of punishment was also submitted to the jury upon another instruction permitting the jury to consider, in deciding whether an existing aggravating circumstance was sufficient to warrant the imposition of death, all of the evidence relating to the murder of Kathy Jo Allen. The jury returned a verdict, fixing the punishment at death and finding the four statutory aggravating circumstances, but not the aggravating circumstance otherwise authorized by law, to exist.

Petitioner's timely motion for new trial alleged that the trial court erred in failing to submit to the jury an instruction upon first degree murder, which may be found in the Legal File at page 49 (references to the Legal File will hereafter be cited as L.F. __); in admitting into evidence that portion of petitioner's confession admitting that he previously had been arrested for an unrelated murder and confined in the penitentiary (L.F. 53); and in submitting to the jury the aggravating circumstance that the murder of Kathy Jo Allen was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson (L.F. 53).

The Missouri Supreme Court affirmed petitioner's sentence of death and conviction of capital murder. The court held that: 1) first degree murder need not have been submitted to the jury, because it was not a lesser-included offense of capital murder and

that the risk of an arbitrary and capricious conviction of capital murder was negated by the submission of intentional second degree murder; 2) evidence of petitioner's arrest on an unrelated murder and confinement in the penitentiary was properly admitted as a part of petitioner's confession and to show petitioner's motive for the killing, but made no comment about the propriety of the jury's consideration of that evidence in the punishment stage of the trial; and 3) there was sufficient evidence to support the jury's finding of the aggravating circumstance that the killing was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson.

Petitioner alleged in his motion for rehearing that the Missouri Supreme Court denied him due process and equal protection of the law and applied an ex post facto law by deciding that first degree murder is not a lesser-included offense of capital murder and affirming his sentence of death and conviction of capital murder, committed in August 19, 1979, even though an instruction upon first degree murder was not submitted to the jury, when that Court reversed a sentence of life imprisonment without probation or parole for fifty years and conviction of capital murder, committed on February 6, 1980, for failure to submit such a first degree murder instruction (A.29).

REASONS FOR GRANTING THE WRIT

Questions Presented 1 and 2

This Court has prohibited, as a violation of the cruel and unusual punishment provision of the Eighth Amendment and of the Due Process Clause of the Fourteenth Amendment, determination of guilt procedures that result in the arbitrary and capricious finding of guilt of an offense for which the death penalty may be imposed. Beck v. Alabama, 447 U.S. 625 (1980). In the Beck case the trial judge was prohibited by Alabama law from instructing the jury upon the noncapital offense of felony murder, a conviction of which would have been supported by the evidence, when the capital offense of robbery-intentional killing was charged. Because under Alabama law the intent to kill necessary for conviction of robbery-intentional killing could not be supplied by the felony-murder doctrine, felony

murder was a lesser-included offense of robbery-intentional killing. Because the jury only was given the option of either convicting the defendant of a capital offense or acquitting him and not the "third option" of convicting him of a lesser-included, noncapital offense, the risk of an arbitrary and capricious conviction of a capital offense, and thus an arbitrary and capricious imposition of the death penalty, was enhanced. Beck v. Alabama, supra, 447 U.S. at 627-630, 637-638. Cf. Hooper v. Evans, ___ U.S. ___, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982), when the evidence would not support a conviction for a noncapital, included offense.

Though the Missouri Supreme Court has characterized first degree murder, §565.003, RSMo 1978, which may be found at A.51-52, as not a lesser-included offense of capital murder, §565.001, RSMo 1978, which may be found at A.51, in the sense of either having necessarily included elements of capital murder or being specifically denominated as a lesser degree of capital murder, State v. Baker, 636 S.W.2d 902, 904 (Mo. banc 1982), first degree murder is a lesser-included offense of capital murder in the third sense that capital murder's requisite intent to kill may not be supplied by the felony-murder doctrine. Missouri has split first degree murder, which included both intentional and felony murder, Section 559.010 RSMo 1969, which may be found at A.51 and no longer exists, into capital murder, §565.001 RSMo 1978, which is intentional murder, and into first degree murder, §565.003 RSMo 1978, which is felony murder. State v. Duren, 547 S.W.2d 476, 478 (Mo. banc 1977); State v. Handley, 585 S.W.2d 458, 461-462 (Mo. banc 1979); State ex rel. Westfall v. Mason, 594 S.W.2d 908, 919-920 and 920 n. 1 (Mo. banc 1980) Bardgett, C.J., dissenting; State v. Haymon, 616 S.W.2d 805, 807 (Mo. banc 1981); State v. Lane, 629 S.W.2d 343, 347 (Mo. banc 1982)¹

The phrase [in §565.003, RSMo 1978] "without a premeditated intent to cause the death of a particular individual" was intended to exclude the homicides now classified as capital murder and committed deliberately, knowingly, etc. It was not intended to exclude intentional, non-deliberate homicides committed in the perpetration of or attempt to perpetrate the enumerated felonies.

¹The repeal of §559.010, RSMo 1969, came about as one of the results of this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). Duren, supra.

Missouri Approved Instructions -- Criminal, V.1, 15.04 Murder in the First Degree in Arson, Note on Use 3 (2d ed., The Missouri Bar, 1979) (hereinafter MAI-CR2d). Previously under §559.010, RSMo 1969, the requirements of proof for intentional murder could be satisfied by proof of murder committed during the course of a felony. State v. Grandberry, 484 S.W.2d 295, 300 (Mo. banc 1972).

The Missouri Supreme Court has examined in Baker, supra, the constitutionality of Missouri's capital murder instructional scheme in light of Beck v. Alabama, supra. The Court failed to realize that first degree murder is included in capital murder in the sense that the intent to kill necessary for capital murder may not be supplied by the felony-murder doctrine. The Court held that the risk of an arbitrary and capricious conviction of capital murder does not exist, because the jury was submitted an instruction upon intentional second degree murder. Baker, supra, 636 S.W.2d at 905. The different mental states required for capital murder and intentional second degree murder, the court reasoned, provide the jury with a "third option," conviction of intentional second degree murder, between conviction of capital murder and acquittal. Baker, supra, 636 S.W.2d at 905.

This "third option" of conviction of a degree of intentional murder different from capital murder is no option at all in the event that the jury were to believe from the evidence that a homicide was committed, but that it was committed without the mental states necessary for either capital murder or intentional second degree murder. In that event, the homicide of which the accused is guilty is first degree murder for which, because of the absence of an instruction submitting it, the jury cannot return a finding of guilt. Also in that event, the jury's decision on guilt of either capital murder or intentional second degree murder, because it is not based upon a determination of the mental states necessary for either offense, must necessarily be arbitrary and capricious.

In petitioner's case, the jury could have disbelieved both the State's evidence that petitioner intentionally killed Kathy Jo Allen and petitioner's testimony that he was at home when the killing occurred,

yet still believed that portion of the State's evidence in petitioner's confessions that he killed Kathy Jo Allen, but that he only intended to hold her Incommunicado throughout the rape trial and that he shot her only when she grabbed his gun. The State's evidence supported two theories of guilt, intentional murder and felony murder, but the trial court submitted only one theory -- intentional murder. In the event that the jury were to believe that portion of the State's evidence in petitioner's confessions, the homicide of which petitioner is guilty is first degree murder for which, because of the absence of an instruction submitting it, the jury cannot return a finding of guilt, and the jury's decision on guilt of capital murder, because it is not based upon a determination of the mental states necessary for that offense, must necessarily be arbitrary and capricious.

Questions Presented 3 and 4

Due process prohibits the unforeseen judicial construction of a state statute that operates, when applied retroactively, as the equivalent of an ex post facto law, prohibited by §10 of Article I of the Constitution. Bouie v. Columbia, 378 U.S. 347 (1964). Even procedural changes that "deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offense charged," Mallett v. North Carolina, 181 U.S. 589, 597 (1901), or "operate to deny the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition," Beazell v. Ohio, 269 U.S. 167, 170 (1925), are prohibited by the ex post facto clause.

In State v. Handley, 585 S.W.2d 458, 461-462 (Mo. banc 1979) a plurality of the Missouri Supreme Court stated that §559.010, RSMo 1969, which no longer exists, included both intentional and felony first degree murder. From September 28, 1975, §565.001, RSMo 1978, then §559.005, RSMo Supp. 1975, includes only intentional first degree murder and is designated "capital murder." Also from that date, §565.003, RSMo 1978, then §559.007, RSMo Supp. 1975, includes only felony first degree murder. The court stated that "a distinct new crime of 'first degree murder' was created," the elements of which are the unlawful killing of a human being without a

premeditated intent committed in the perpetration of or attempt to perpetrate one of five enumerated felonies.

The court further stated that intentional second degree murder, §565.004, RSMo 1978, which may be found at A.52 and then §559.020, RSMo 1969, is not a lesser-included offense of first degree murder, because first degree murder does not include the elements of intentional second degree murder. Thus since the indictment charged only first degree murder, the submission to the jury of an instruction upon second degree murder was error, and the court reversed the defendant's conviction for second degree murder.

The Handley case did not decide the issue of whether intentional second degree murder is a lesser-included offense of first degree murder, and certainly not the issue of whether first degree murder is a lesser-included offense of capital murder, because only three judges of the Missouri Supreme Court concurred in the result, the reversal of the intentional second degree murder conviction, not the reasoning by which that result was reached. State v. Bradshaw, 593 S.W.2d 562, 565 (Mo. App. 1979). The Missouri Supreme Court's denial of transfer in Bradshaw, supra, which adopted the reasoning of Handley, supra, also did not decide the issue of whether first degree murder is a lesser-included offense of capital murder. See: Maryland v. Baltimore Radio Show, 388 U.S. 912, 919 (1950). In fact, at the time of the killing in petitioner's case, August 19, 1979, and at the time of his trial, September 30 through October 17, 1980, the Missouri Supreme Court required an instruction upon first degree murder, if supported by the evidence, to be submitted to the jury when capital murder was the highest degree of homicide submitted. MAI-CR2d Supplemental Note on Use 15.00 3d and Caveat c. Thus it was the law at the time of the killing in petitioner's case and at the time of his trial that an instruction upon first degree murder was required to be submitted to the jury. It was not the law at those times that an instruction upon first degree murder was not required to be submitted.

In State v. Wilkerson, 616 S.W.2d 829, 831-832 (Mo. banc 1981) a majority of the Missouri Supreme Court ruled that under §556.220, RSMo 1969, which may be found at A.51 and which had been the law

In Missouri since 1835, intentional second degree murder is a lesser-included offense of first degree murder and thus affirmed a conviction for intentional second degree murder upon an indictment charging only first degree murder. The court reasoned that since §556.220, RSMo 1969, permits the jury to find the accused guilty "of any degree of such offense inferior to that charged in the indictment" intentional second degree murder is a lesser-included offense first degree murder, even though the elements of those offenses differ. The Wilkerson case criticized the Handley case not for recognizing that capital murder and first degree murder are distinct crimes, but for failing to recognize the effect of §556.220, RSMo 1969, and declaring intentional second degree murder not to be a lesser-included offense of first degree murder.

In State v. Gardner, 618 S.W.2d 40 (Mo. 1981) the Missouri Supreme Court, citing the Wilkerson case, reversed a sentence of life imprisonment without probation or parole for fifty years and conviction of capital murder, which occurred on August 31, 1978 (see State v. Mercer, 618 S.W.2d 1, 3 (Mo. banc 1981) for the date), for failure to submit to the jury an instruction upon first degree murder. In State v. Fuhr, 626 S.W.2d 379 (Mo. 1982) the Court, citing the Wilkerson and Gardner cases, reversed a sentence of life imprisonment without probation or parole for fifty years and conviction of capital murder, committed on February 6, 1980, for failure to submit first degree murder.

In State v. Baker, 636 S.W.2d 902, 904-905 (Mo. banc 1982) the Missouri Supreme Court ruled that under §556.046.1(2), RSMo 1978, which may be found at A.51 and which replaced §556.220, RSMo 1969, on January 1, 1979, first degree murder is not a lesser-included offense of capital murder and affirmed a sentence of death and conviction of capital murder, committed on June 19, 1980, even though an instruction upon first degree murder was not submitted to the jury. The court reasoned that since under §556.046.1(2), RSMo 1978, an offense is included in the information when "[i]t is specifically denominated by statute as a lesser degree of the offense charged" first degree murder is not a lesser-included offense of capital murder.

The Missouri Supreme Court in petitioner's case relied upon Baker, supra, in concluding that an instruction upon first degree murder need not have been submitted.

First degree murder in Gardner, supra, 618 S.W.2d at 40, is a lesser-included offense of capital murder because of the language of the statute defining lesser-included offenses ("any degree of such offense inferior to that charged in the indictment") in effect at the time the killing in that case was committed -- prior to January 1, 1979. First degree murder in petitioner's case and in Baker, supra, 636 S.W.2d at 904-905, is not a lesser-included offense of capital murder because of the language of the statute defining lesser-included offenses ("[i]t is specifically denominated by statute as a lesser degree of the offense charged") in effect at the time the killings in those cases were committed -- subsequent to January 1, 1979. Yet first degree murder in Fuhr, supra, 626 S.W.2d at 379, is a lesser-included offense of a capital murder that was committed subsequent to January 1, 1979, and a conviction of capital murder and sentence of death was reversed for failure to submit an instruction upon first degree murder. And yet a conviction of first degree murder, committed subsequent to January 1, 1979, was affirmed upon a charge of capital murder. State v. Daugherty, 631 S.W.2d 637, 638-639 (Mo. 1982). And yet a conviction of first degree murder, committed subsequent to January 1, 1979, was reversed for failure to submit instructions upon intentional and felony second degree murder. State v. Donovan, 631 S.W.2d 39, 40, 41 (Mo. 1982).

There are six reasons the Missouri Supreme Court's decision in petitioner's case and in Baker, supra, relied upon in petitioner's case, that first degree murder is not a lesser-included offense of capital murder is an unforeseen construction of §556.046.1(2), RSMo 1978, defining lesser-included offenses as those offenses "specifically denominated by statute as a lesser degree of the offense charged," that operates, when applied retroactively, as the equivalent of an ex post facto law. First, intentional second degree murder was a lesser-included offense of first degree murder under a statute, in existence from 1835 until January 1, 1979, defining lesser-included

offenses as "any degree of such offense inferior to that charged in the indictment." Secondly, the Missouri Supreme Court required in its notes on use to its approved instructions, at the time of the killing in petitioner's case and at the time of his trial, the submission of first degree murder, if supported by the evidence, when capital murder was the highest degree of homicide submitted. Thirdly, a sentence of life imprisonment without probation or parole for fifty years and conviction for capital murder, committed subsequent to January 1, 1979, was reversed for failing to submit an instruction upon first degree murder. Fourthly, a sentence of life imprisonment and a conviction of first degree murder, committed subsequent to January 1, 1979, was affirmed upon a charge of capital murder. Fifthly, a conviction of first degree murder, committed subsequent to January 1, 1979, was reversed for failure to submit instructions upon intentional and felony second degree murder. Sixthly, the change in the language defining lesser-included offenses from "any degree of such offense inferior to that charged in the indictment" to "specifically denominated by statute as a lesser degree of the offense charged" is so slight as to be without significance.

The Missouri Supreme Court's affirmance of petitioner's sentence of death and conviction of capital murder, committed on August 19, 1980, even though an instruction upon first degree murder which was supported by the evidence was not submitted to the jury, violates equal protection, when that Court reversed in Fuhr, supra, 636 S.W.2d at 379, a sentence of life imprisonment without probation or parole for fifty years and conviction of capital murder, committed on February 6, 1980, for failure to submit a first degree murder instruction. The Court has treated similarly situated defendants -- petitioner and Fuhr, who both committed murders subsequent to January 1, 1979 and in whose trials an instruction upon first degree murder was not submitted to the jury -- differently, yet failed to advance any rational basis to justify this disparate treatment. See: Jones v. Helms, 452 U.S. 412 (1981); Carey v. Brown, 447 U.S. 455 (1980).

Question Presented 5

The jury's discretion to fix death as punishment must be directed so that the imposition of death is not done arbitrarily and capriciously, in violation of the cruel and unusual punishment provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Furman v. Georgia, 408 U.S. 238 (1972). This direction of the jury's discretion is accomplished in Missouri by holding, after a finding of guilt has been returned, a "pre-sentence hearing," at which the jury "shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas." §565.006.2, RSMo Supp. 1982. Evidence in aggravation is that evidence, introduced either at the determination of guilt proceeding or the determination of punishment proceeding, relevant to those aggravating circumstances specified by statute. §§565.012.1(1) and §565.012.2, RSMo Supp. 1982. Evidence in aggravation is also "[a]ny ... aggravating circumstances otherwise authorized by law." §565.012.1(3), RSMo Supp. 1982. The only other aggravating circumstance otherwise authorized by law is "the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant." §565.006.2, RSMo Supp. 1982. Evidence in mitigation is that evidence, introduced at either the determination of guilt proceeding or the determination of punishment proceeding, relevant to those mitigating circumstances specified by statute. §§565.012.1(2) and §565.012.3, RSMo Supp. 1982. Evidence in mitigation is also "[a]ny mitigating ... circumstances otherwise authorized by law." §565.012.1(3), RSMo Supp. 1982. The only other mitigating circumstance otherwise authorized by law is "the absence of any such prior criminal convictions and pleas." §565.006.2, RSMo Supp. 1982.

Both the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere and the record of any prior arrests and confinements are not relevant to the determination of guilt. The former is only relevant to the issue of credibility, §491.050, RSMo Supp. 1982, and thus is admissible for that purpose at the determination of guilt proceeding. The latter is relevant to show

motive, among other things, as the Missouri Supreme Court reasoned in the opinion affirming petitioner's sentence and conviction, and thus is also admissible for that purpose at the determination of guilt proceeding. Both the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere and the record of any prior arrests and confinements are relevant in the usual case to the determination of punishment. Section 557.036.1, RSMo Supp. 1982. But in the death case, so that the jury's sentencing discretion is directed to avoid the arbitrary and capricious imposition of death, what is usually relevant to the determination of punishment has been limited to that evidence relevant to the statutory aggravating or mitigating circumstances, §§565.012.1(1) and (2), 565.012.2 and .3, RSMo Supp. 1982, and the aggravating or mitigating circumstances otherwise authorized by law, §565.012.1(3), RSMo 1978, which are "the record of any prior criminal convictions in which pleas of guilty or pleas of nolo contendere or of the defendant, or the absence of any such prior criminal convictions and pleas." §565.006.2, RSMo Supp. 1982, not the record of prior arrests and confinements.

The finding by the jury of the existence of a statutory aggravating circumstance or an aggravating circumstance otherwise authorized by law does not compel the jury to fix punishment at death. After it finds an aggravating circumstance exists and before it may fix punishment at death, the jury must decide whether an existing aggravating circumstance is sufficient to warrant the imposition of death. Section 565.012.1(4), RSMo Supp. 1982; MAI-CR2d 15.42; State v. Bolder, 635 S.W.2d 673, 683 (Mo. banc 1982). In making its decision whether an existing aggravating circumstance is sufficient to warrant the imposition of death, the jury may consider "all of the evidence relating to the murder," in other words, all of the evidence introduced at the determination of guilt proceeding. MAI-CR2d 15.42.

The Missouri General Assembly has not authorized the record of prior arrests and convictions to be an aggravating circumstance or a reason for finding that an exiting aggravating circumstance is sufficient to warrant the imposition of death. Thus evidence of the record of prior arrests and convictions is not relevant to the jury's

sentencing decision in the death case. The reason the General Assembly has not made that authorization and why the imposition of death, if based upon the record of prior arrests and confinements, is arbitrary and capricious is obvious -- what one jury may consider to be a record of prior arrests and confinements sufficient to warrant the death penalty another jury may not. See: Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976); State v. White, 395 A.2d 1082 (Del. 1978).

In petitioner's case, four statutory aggravating circumstances and the aggravating circumstance otherwise authorized by law, petitioner's record of prior criminal convictions for attempted burglary, second degree, and assault with intent to rob with malice, were submitted to the jury, and it only found the four statutory aggravating circumstances to exist. In determining whether an existing aggravating circumstance was sufficient to warrant the imposition of death, the jury was permitted to consider all of the evidence relating to the murder of Kathy Jo Allen, which included that portion of petitioner's confession, introduced into evidence over his objection, admitting that he had been arrested for an unrelated murder and confined in the penitentiary. If one of the reasons the jury found the existing aggravating circumstances warranted the imposition of death was that petitioner had been arrested for an unrelated murder and confined in the penitentiary, then death has been imposed arbitrarily and capriciously upon petitioner.

Questions Presented 6 and 7

This court has prohibited, as a violation of the cruel and unusual punishment provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment of the Constitution, such a broad and vague construction of a statutory aggravating circumstance as to result in, under the evidence of a particular killing and as the aggravating circumstance previously had been construed, the arbitrary and capricious imposition of the death penalty. Godfrey v. Georgia, 446 U.S. 420 (1980). In the Godfrey case this Court found that the evidence of the killing was insufficient to support a finding of the aggravating circumstance that the killing was outrageously or wantonly vile, horrible or inhuman in that it involved torture,

depravity of mind, or an aggravated battery to the victim, as that aggravating circumstance previously had been construed by Georgia decisions. Godfrey v. Georgia, *supra*, 446 U.S. at 429-433.

The Missouri Supreme Court has construed "lawful custody" in §565.012.2(9), RSMo Supp. 1982, to mean custody under color of law or custody of a lawful authority. State v. Trimbel, 638 S.W.2d 726, 733 (Mo. banc 1982). Thus lawful custody is present custody, not a future possibility of custody. State v. Blair, 638 S.W.2d 739, 761 (Mo. banc 1982) Sells, J., dissenting.

In petitioner's case, the statutory aggravating circumstance that the murder of Kathy Jo Allen was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson, §565.012.2(10), RSMo Supp. 1982, was submitted to the jury, which found it and three, other statutory aggravating circumstances to exist. But there was no evidence from which the jury could find that the present custody of Larry Jackson was interfered with as a result of the killing of Kathy Jo Allen. Larry Jackson was in custody not only for the rape of Allen, but also for the first degree murder, second degree robbery and armed criminal action of Jerry Willard Han, charges for which Jackson was eventually convicted. State v. Jackson, 608 S.W.2d 420 (Mo. 1980). The only way the killing of Allen could have interfered with the lawful custody of Jackson was to affect the outcome of Jackson's future trial, and thus the future possibility of custody. Even assuming that lawful custody encompasses future possibility of custody, there was no evidence from which the jury could find that the outcome of the rape trial was affected by Allen's death. Jackson could have been convicted of rape even though Allen was dead, because there may have been a witness, or Jackson may have confessed, or circumstantial evidence may have been sufficient.

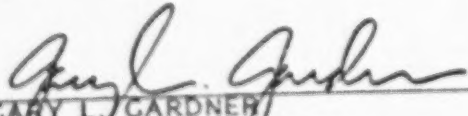
In Zant v. Stephens, ___ U.S. ___, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), this Court certified to the Georgia Supreme Court the question of what premises of state law support the conclusion that a sentence of death should not be reversed for the invalidity of one of the aggravating circumstances the jury found to exist, when other, valid aggravating circumstances the jury also found to exist. The

Georgia jury had fixed a sentence of death after finding three aggravating circumstances, one of which was declared unconstitutional by the Georgia Supreme Court, which, nevertheless, affirmed the sentence. Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976). The Court of Appeals, Fifth Circuit, reversed the sentence, however, because it was "impossible" for it to determine whether the sentence of death was not "decisively affected" by the unconstitutional aggravating circumstance. Stephens v. Zant, 631 F.2d 397, 406 (CA5 1980); State v. Mercer, 618 W.S.2d 1, 17-20 (Mo. banc 1981) Sailer, J., dissenting. The Court of Appeals' reasoning -- that even if the jury found other aggravating circumstances to exist, it was possible that it would not have recommended death but for finding that the unconstitutional aggravating circumstance existed -- precisely applies to petitioner's case, in which the jury found four aggravating circumstances, one of which, that the killing was committed for the purpose of interfering with a lawful custody in a lawful place of confinement, cannot constitutionally stand for the reason that it was not supported by the evidence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,


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Counsel for Petitioner

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

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82 5834

WALTER JUNIOR BLAIR,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

On Petition for a Writ of Certiorari to the Missouri Supreme Court, en Banc.

APPENDIX

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AUG 31 1962

IN OFFICE OF
CLERK SUPREME COURT



Supreme Court of Missouri

en banc

STATE OF MISSOURI,

Respondent,

s.

No. 62782

ALTER JUNIOR BLAIR,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
Honorable Richard P. Sprinkle, Judge.

Appellant was convicted of capital murder, § 565.001, RSMo 1962, and sentenced to death by a jury pursuant to § 565.008, RSMo 1978. This court has jurisdiction for this original appeal under Mo. Const. art. V, § 3. Review includes consideration of both alleged trial errors and the death sentence. § 565.014.

The jury could reasonably have found that on April 2, 1979, Miss Allen was allegedly raped by Larry Jackson at her apartment. Thereafter, Jackson was arrested, charged with the rape, and placed in custody in the Jackson County Jail on this and other charges.¹ While in jail, Jackson attempted to prevent Miss Allen from testifying against him. He made four or five threatening telephone calls to Miss Allen, and other phone calls were made to her by Jackson's girl friend and by a Jackson County Jail inmate posing as an attorney. When these efforts proved unsuccessful, Jackson approached other inmates in the Jackson County Jail and asked if they would keep Miss Allen from appearing in court. Several inmates referred Jackson to appellant, who had been released from the Missouri State Penitentiary about eight months previously and who was then in the same jail. According to appellant's confession, he had a reputation in jail of not being afraid of anyone and of "being able to hold my own." Sometime during June or July of 1979, Jackson met appellant in the maximum security section of the jail and

¹ After the alleged rape of Miss Allen, Jackson committed a murder and robbery. State v. Jackson, 608 S.W.2d 420 (Mo. 1980).

offered appellant \$2,000 to keep Miss Allen from testifying. During subsequent conversations, Jackson told appellant he wanted the rape victim killed preferably by putting a bomb in her apartment. Jackson further stated that his brother had some money coming in from a car accident and that this money would be used to pay appellant.

On July 16, 1979, appellant was released on bond from the Jackson County Jail. Appellant then spoke with Jackson, who was still in jail, several times by telephone about the proposed murder and Jackson raised his offer to \$6,000. At some time after his release, he went to visit members of the Jackson family "to see if [the proposal] was for real." The family gave him Kathy Jo Allen's address and telephone number and provided him with a car (1964 Oldsmobile) which he could use to keep her under surveillance.

On Friday, August 17, three days before Miss Allen was scheduled to go to court and testify regarding the rape, appellant told a friend, Ernest Jones, that he was going to watch the "white girl" that night and that he might "take her out [kill her]." The next day when appellant saw Jones, he told Jones that he had seen the girl and her boyfriend having sex and that if he had had a gun he would have killed them both. At around 8:00 or 9:00 p.m. that same evening of Saturday, August 18, appellant met Ernest Jones at a community center and showed him a .32 caliber pistol which appellant said he had stolen out of a car that day. At 2:00 or 2:30 a.m. that morning (Sunday, August 19), appellant and his girl friend, Sharon Jones, left Ernest Jones's residence and went to the home of appellant's mother, where appellant lived. Several minutes after they arrived at the house, appellant left, telling Sharon Jones that he was "going to kill the white bitch" and that he would be back before sunrise. According to Sharon Jones, appellant wore a dark-colored hooded shirt or sweater, blue jeans, high-topped black tennis shoes, and black leather driving gloves.

After leaving his house, appellant walked to the apartment of Kathy Jo Allen, where he hid across the street and watched for suspicious activity. Seeing none, appellant stood under the apartment bedroom window, removed the screen, and entered the bedroom. At this time Miss Allen and her boyfriend, Robert, were asleep on a mattress in the living room. Appellant took Robert's wallet and watch from a table and removed a pillow case which he wrapped around the lower part of his face. At around 6:00 a.m., Robert woke up. Appellant pointed the gun and told Robert to stay where he was and, when Robert began to sit up, said, "If you move again . . . I'll blow your f brains all over this room." When Miss Allen awoke, appellant stated that he was just there to rob them and that he was not going to hurt or kill anyone. Appellant removed the money from Robert's wallet and took a man's diamond ring.

which Robert had attempted to hide under his pillow. Appellant said that he wanted Kathy to act as his driver and ordered her to get dressed. He refused Robert's offer of the keys to his car and Robert's suggestion that he (Robert) act as driver. As appellant and Allen prepared to leave, appellant told Robert that Allen would be right back in seven to ten minutes. Appellant told Miss Allen to her car and the two drove away. Robert called the police. He had not seen appellant's full face, but gave a description of appellant's height, weight, age, and clothing. This description matched that of appellant, although Robert tentatively identified Ernest Jones in a lineup as the perpetrator.

At around 6:30 a.m., a woman named Moore who lived on E. 34th Street in Kansas City heard screaming and two gunshots, another scream, and a third shot. Shortly thereafter, she saw a black male walk past her house. At approximately 7:00 a.m., police found the body of Kathy Jo Allen next to her abandoned car in a vacant lot at 34th and Tracy. This location was four blocks from appellant's home. The victim was nude from the waist up (her blouse was found nearby) and had been shot in the head, chest, and wrist. Subsequent examination of the gunpowder burns around the wounds indicated that the shots had been fired from close range, in the area of two to two and one-half feet away. The body also bore abrasions and lacerations which were consistent with the victim's being struck in the head with a brick before her death. Also found at the scene were an expended bullet discovered under the body and several tennis shoe footprints around the victim, which were photographed.

Also at around 7:00 a.m. that morning, appellant returned to his mother's house. When he arrived, his girl friend (Sharon Jones) observed that he was out of breath and that he was carrying a pillowcase with objects in it. Appellant emptied the pillowcase on the floor and Jones saw a brown purse, a silver diamond ring, two watches, and appellant's gun and gloves. Shortly thereafter, appellant heard police helicopters circling overhead. He put the items back in the pillowcase and left the house. An hour later, he returned without the pillowcase but wearing the man's watch and the ring. That day (Sunday, August 19), appellant and Sharon Jones went over to Ernest Jones's house. Appellant told Ernest Jones how he had abducted Kathy Jo Allen and that at the vacant lot "he hit her with a brick and that she wouldn't tell so he shot her." Appellant passed around the diamond ring and man's watch he had taken and also displayed the driver's license of Kathy Jo Allen. Appellant stated that all he had to do was to show the victim's driver's license to Larry Jackson's family and they would pay him. That evening, appellant told Kathy Jo Allen's purse, the stolen pillowcase, and a spent shell casing and burned them in his backyard.

The next day, Monday, August 20, appellant and Ernest Jones went to a pawnshop where they attempted to pawn the stolen diamond ring, but were unable to do so. Nevertheless, they saw an older brother of Ernest Jones, Frederick Jones, who pawned the ring for \$50. He gave the money to Ernest Jones who in turn gave it to appellant. On Tuesday morning, August 21, appellant showed Larry Jackson's relatives the victim's driver's license. Appellant spoke with Jackson by telephone and, according to appellant's confession Jackson said that he appreciated what appellant had done, loved him like a brother, and that appellant would get the promised \$6,000. Also that morning police arrested Frederick Jones, who had pawned the ring, and shortly thereafter took Ernest Jones into custody. When appellant heard about these arrests, he gave Ernest Jones's girl friend, Tina Jackson, a telephone number and told her to have Ernest call him at that number so he could provide Ernest and Frederick with bond money. Appellant said that Ernest should ask for "Cody" when he called. That afternoon, police interviewed Tina Jackson, obtained from her the telephone number given by appellant and determined that the number corresponded to an apartment at 4406 Tracy rented by Linda Robertson, who was Larry Jackson's sister. When police went to this residence, they were told by Robertson that appellant was not there. Thereafter, officers went to appellant's home, where they were admitted by appellant's mother. In appellant's room, they saw an orange or gold hooded sweater, which they seized. Later analysis of this sweater revealed paint chips consistent with the paint on the outside of Kathy Jo Allen's apartment and cat hair consistent with a cat owned by the victim.

On Wednesday morning, August 22, Ernest Jones assisted police by making two telephone calls to the number given by appellant. Subsequently, assured that appellant was at the location because a person answered by the code name "Cody", police officers entered the apartment of Linda Robertson and found appellant there together with several members of the Jackson family. A man's watch similar to Robert's was found near appellant and a pistol was later found in a closet of the apartment. Forensic analysis of the pistol revealed that two expended bullets found in and near the body of Kathy Jo Allen and a shell cartridge which appellant had burned in his backyard had all been fired from this weapon. After his arrest, appellant was advised of and waived his Miranda rights at least two times and thereafter gave an oral and written confession. Later, appellant gave a third confession on videotape after he was again advised of and waived his Miranda rights on the videotape. In his consistent and detailed confessions, appellant admitted that while he was in the maximum security section of Jackson County Jail he met Larry Jackson. Jackson thought he could "beat the rape case by keeping the girl

from not showing up in court" and offered appellant "\$2,000.00 to keep the female from showing up in court, who was going to testify against him on a rape." Larry Jackson "described her apartment . . . and told [appellant] he he raped this girl".

After we discussed the girl testifying against him and him offering me \$2,000.00, he told me, the first time, that he wanted me to just keep her from going to court until he was cut loose. We talked about this eleven or twelve more times and he finally told me that he wanted me to kill her to keep her from testifying. He told me the best way would be to put a bomb in her house to kill her.

As the time came closer to court LARRY [Jackson] raised his price to \$6,000.00 to get me to keep the girl from coming to court.

This last Saturday night, 8-18-79, while I was at LARRY'S sister's house, . . . LARRY'S brother and his brother's friends had their gas bombs and were going to go over and bomb this girl's apartment and get rid of her. That's when I made up my mind I would take care of the girl for LARRY and told his brother and his brother's friends that I would take care of it. At that time my intentions were to just get the girl and hold her in a vacant house until LARRY JACKSON went to court.

Appellant then described how he had stolen a .32 caliber revolver, entered Miss Allen's apartment, and forced her to drive her car. He admitted the killing for which he had been hired by Jackson, but claimed that he had not intended to kill her and that he shot her only when she grabbed his gun.

As a result of what appellant revealed in his confessions, police found the driver's license of Kathy Jo Allen in a sewer where appellant had hidden it after showing it to the Jackson family, and also located a metal clasp, an expended shell casing, and a check, although burned still containing the printed name of Kathy Jo Allen, in appellant's backyard. The footprints found near the victim's apartment and at the scene of her murder were found to closely resemble the black tennis shoes worn by appellant at the time of his arrest.

On August 31, 1979, appellant was charged by indictment with capital murder.² The trial began with voir dire on September 30, 1980. After exten-

2. The indictment read:

The Grand Jurors of the County of Jackson, State of Missouri charge that the defendant, WALTER JUNIOR BLAIR, in violation of section 565.011 RSMo [sic], committed the class "A" felony of capital murder punishable upon conviction under section 565.008.1 RSMo, in that the defendant, WALTER JUNIOR BLAIR, either acting alone or knowingly in concert with another, wilfully, knowingly, with premeditation, deliberately and unlawfully killed Katherine Jo Allen by shooting her on or about the 19th day of August,

sive and individual voir dire, the jury was empaneled on Friday, October 3, 1980. On Monday, October 6, 1980, opening statements were made by each party. After the state had introduced appellant's confessions, numerous witnesses tied the physical evidence to appellant, and the testimony of several witnesses to whom appellant had admitted the killing of or that he was going to kill Miss Allen, appellant testified and called seven other witnesses in his defense. His theory of defense was essentially that Ernest Jones had committed the murder, and that appellant's confessions were all false and had been coerced by the threats and promises of police officers. Appellant admitted prior convictions for assault with intent to rob with malice aforethought and attempted second-degree burglary.

At the close of the evidence, the court submitted to the jury instructions on capital murder, second-degree (intentional) murder, and manslaughter. At 11:52 a.m. on Thursday, October 16, 1980, the jury retired to deliberate. That same day at 6:48 p.m. the jury returned a verdict finding appellant guilty of capital murder. At the punishment-stage proceeding, the only evidence introduced were certified copies of appellant's two prior convictions, submitted by the state. After the supplemental instructions and arguments of counsel, the jury retired to deliberate and consider the punishment at 11:15 a.m. on Friday, October 17, 1980. At 2:35 p.m., the jury read a verdict with regard to punishment and imposed a sentence of death. The verdict form listed four aggravating circumstances that the jury found beyond a reasonable doubt:

1. The defendant, Walter Blair, murdered Kathy Jo Allen for the purpose of receiving money or anything of monetary value.
2. The defendant, Walter Blair, as an agent or employee of Larry Jackson and at his direction, murdered Kathy Jo Allen.
3. The murder of Kathy Jo Allen involved torture and depravity of mind and that as a result thereof it was outrageously and wantonly vile and inhuman.
4. The murder of Kathy Jo Allen was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson.

Appellant then brought this appeal from his conviction and sentence, making thirteen assignments of error.

I

Appellant first contends that under *State v. Gardner*, 618 S.W.2d

2. cont'd

1979 in the County of Jackson, State of Missouri, thereby causing her to die on the 19th day of August, 1979 in the County of Jackson, State of Missouri.

(Mo. 1981), and *State v. Wilkerson*, 616 S.W.2d 829 (Mo. banc 1981), the trial court erred in failing to give an instruction on first-degree murder (§ 505.003) because there was evidence that the murder occurred during the commission of kidnapping, burglary, and robbery.

First-degree murder is not a lesser-included offense of capital murder and therefore the court did not err in failing to instruct on first-degree (felony) murder. *State v. Baker*, _____ S.W.2d _____ (Mo. banc 1982) [No. 63244 decided 8/23/82].

Where appellant was only indicted for capital murder, it would have been error for the trial court to have instructed on first-degree murder. The court may not instruct on an offense not specifically charged in the information or indictment unless it is a lesser included [or lesser degree] offense. This is because due process requires that a defendant may not be convicted of an offense not charged in the information or indictment." *State v. Smith*, _____ S.W.2d 165, 165 (Mo. banc 1979). See also Mo. Const. art. I, § 17.³ Of course, the state if it chose to charge or seek an indictment of first-degree murder in addition to capital murder, which would allow an instruction on first-degree murder, could do so. Rule 23.05. But such is not the instant case. Nor is this a situation where a defendant charged only with capital murder requests and gets an instruction on first-degree murder, and then is convicted of first-degree murder. The point is overruled.

II

Appellant next contends that his confessions should have been suppressed because they were the products of an illegal arrest and were involuntary.

He alleges first that the illegal arrest tainted the confessions because there were no intervening events breaking the causal connection between the illegal arrest and the confessions so that the confessions were "sufficiently an act of free will to purge the primary taint." Hence, the confessions were inadmissible under *Dunaway v. New York*, 442 U.S. 200 (1979) and *Brown v. Illinois*, 422 U.S. 590 (1975). See also *Taylor v. Alabama*, 102 S.Ct. 2664 (1982). The threshold question is whether appellant's arrest was illegal; *Taylor*, 102 S.Ct. at 2667. We hold it was not an illegal arrest. On Tuesday, August 21, 1979, two days after the murder of Kathy J.

3. In *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977), the court held that when a defendant was forced to defend against felony murder when he was charged only with deliberate and premeditated murder, the resulting conviction was a denial of due process under the fourteenth amendment. In that case Ohio law made it clear that premeditated murder and felony murder were two separate offenses. *Id.* at 334-35.

Allen, Kansas City police officers discovered that a silver diamond ring taken from the victim's boyfriend at the time of her abduction had been pawned at a local pawnshop by Frederick Jones. Based on this information, police arrested Frederick Jones and later took into custody his brother, Ernest Jones, and learned from their statements that the actual possessor of the stolen ring was appellant. From the statement of Ernest Jones and Sharon Jones, appellant's girl friend, the officers were informed that appellant had committed the murder of Kathy Jo Allen. In addition, police officers had recovered a gold hooded shirt, identified by appellant's mother as appellant's, and matching Robert's description of the assailant's shirt.

Later, Tina Jackson, Ernest Jones's girl friend, received a telephone call from appellant in which appellant gave her a telephone number where he could be reached (telling her to have the caller use the code name "Cody" so he could provide bond for Ernest and Frederick Jones. This information was given to police. The investigating officers determined that this telephone number belonged to an apartment occupied by Linda Robertson, a sister of Larry Jackson, and went to her apartment to inquire whether appellant was there. Robertson answered the officers's knock and told them that appellant was not there and the officers left without entering the apartment.

At around 9:00 a.m. on the next day (August 22), the police had Ernest Jones call Linda Robertson's apartment again and, by asking for "Cody" he and the police determined that appellant was there. Police then surrounded the Robertson apartment and Jones made a second call and engaged appellant in conversation. While this occurred, a single police officer, Detective Clarence Luther, knocked on the apartment door and when asked who was there identified himself as a police officer. After he did so he heard the sound of one or more persons running from the front of the apartment to the back, away from the door. When the door was opened by Linda Robertson, Detective Luther stated that he was there looking for Walter Blair and asked if he was there. In reply, Ms. Robertson opened the apartment door wide and stepped back, and Detective Luther entered the apartment. Luther walked toward the back of the apartment (the direction of the running) and saw through an open bedroom door three men lying fully clothed on mattresses feigning sleep. The police officer recognized one of the men as appellant and placed him under arrest.

The police had facts sufficient for a prudent person to believe that appellant had committed the murder. *State v. Berry*, 609 S.W.2d 948, 952 (Mo. banc 1980). Probable cause existed for the arrest. Although appellant also complains that he was arrested without a warrant, he was arrested with probable cause in a third person's apartment where there was substantial evidence for the trial court to find that the lessee of the apartment consented to the

entry and search. Appellant cannot be heard to complain. See Steagald v. United States, 451 U.S. 204, 211-12, 218-19 (1981). Cf. Payton v. New York, 445 U.S. 573 (1980).

Appellant additionally alleges that his confessions were involuntary. This places the burden on the state to prove that the statements were voluntary. State v. Olds, 569 S.W.2d 745, 751 (Mo. banc 1978). Nevertheless our review is limited to whether the trial court's findings are supported by substantial evidence. State v. Olinghouse, 605 S.W.2d 58, 66 (Mo. banc 1980); State v. Higgins, 592 S.W.2d 151, 158 (Mo. banc 1979), appeal dismissed 446 U.S. 902 (1980).

At the suppression hearing, appellant testified that while at the police station an officer put a rifle to the back of appellant's head, after forcing him to kneel, and threatened to shoot him, promised him twenty to twenty-five years' imprisonment if he would confess, and promised that Linda Robertson would not be held for murder and her children taken away from her appellant were to confess.

Nevertheless, other evidence introduced at the suppression hearing was sufficient so that the trial court could reasonably have found that after appellant's arrest, he was transported to the Kansas City police headquarter. There, he was interviewed by two police officers, who first advised appellant of his Miranda rights and then gave him a Miranda form to read. In response appellant signed the written Miranda waiver and told the officers that "he didn't want an attorney". No threats or promises of any kind were made to appellant at this or any other time during the interview, and no guns were displayed by the interviewing officers. Appellant was not detectably under the influence of alcohol or drugs, and his demeanor during the interview was described as "cocky" and sure of himself. After his written waiver, appellant gave an extensive oral confession to the murder, which began at 9:57 a.m. and lasted something less than two hours. Appellant was then asked if he would willing to make a written statement and, when he agreed, a typist was obtained. From 11:54 a.m. to around 2:00 p.m., appellant gave a second statement after signing a waiver wherein the officers's questions and his answers were reduced to a seven-page typed statement. Appellant then read through the statement, signed it and initialed each page. Various breaks were taken during the questioning process and appellant was offered and refused coffee, soft drinks, and cigarettes.

After appellant's written statement had been completed and signed, he was taken across the street to the warrant office of the Jackson County prosecutor's office. While there, appellant was asked if he would be willing to give his confession on videotape and was told that he would have an attorney.

ney present if he desired. Appellant agreed to make a videotaped statement and repeatedly stated that he did not want an attorney. As appellant was being transported by officers to the grand jury room where the videotaping would take place, they encountered Kevin Locke, an assistant public defender who represented appellant on an unrelated charge. As appellant passed, Locke greeted him and appellant made an unknown reply, whereupon appellant and the accompanying officers continued on. Locke then demanded to speak with appellant and was refused. Mr. Locke did not represent appellant on the murder charge. At the beginning of his videotaped statement, appellant was again advised of his Miranda rights and again waived them. Appellant then made his third confession to the murder of Kathy Jo Allen.

The totality of the circumstances, including appellant's signed waiver forms after being repeatedly given Miranda warnings together with his detailed, consistent confessions, provide substantial evidence that appellant's confessions were voluntary--the products of an essentially free and unconstrained choice of their maker. Nor does the fact that Kevin Locke requested to speak with appellant dictate another result. Although Locke represented appellant on an unrelated charge, appellant made no request for any attorney and in fact repeatedly stated that he did not want an attorney. The trial court did not err in overruling appellant's motion to suppress his confessions.

III

Appellant argues that the pistol, watch, and shoes taken from the place of his arrest should have been suppressed because they were the products of an illegal arrest, there was no voluntary consent to search the premises and the search warrant was based on illegal entry and involuntary consent.

Appellant's arrest was proper. See point II supra. After appellant was arrested, the arresting officer, Detective Clarence Luther, in a place where he had the right to be, inadvertently discovered in plain view on the floor near appellant a man's wristwatch which resembled the one taken from Kathy Jo Allen's boyfriend at the time she was abducted and murdered, and a pair of gloves which resembled the ones the assailant had been described as wearing. It was apparent that these were evidence and Detective Luther seized them. State v. Strickland, 609 S.W.2d 392, 395 (Mo. banc 1980); State v. Clark, 592 S.W.2d 709, 713 (Mo. banc 1979), cert. denied, 449 U.S. 847 (1980). After appellant had been placed in the police car, Detective Luther seized appellant's shoes because they matched the description and tread pattern of those worn by the murderer.

Thereafter, Linda Robertson, the lessee of the apartment, executed

written consent to search her apartment. She was handed the form which described the .32-20 pistol to be looked for. In the presence of two or three officers, with no evidence of any force used or weapons displayed, she signed the consent form. Assuming appellant even had a legitimate expectation of privacy in the area searched, there was substantial evidence to support a finding that written consent, given by the lessee of the apartment, was voluntarily given. See *State v. Csolak*, 571 S.W.2d 118 (Mo.App. 1978).

After the consent form had been signed, a police dog sensitive to nitrates, an ingredient in gunpowder and explosives, was taken through the apartment. The dog indicated the presence of nitrates in a box in a closet. A search warrant was then obtained. The box was searched pursuant to the warrant and a .32 caliber pistol was discovered and seized. Forensic analysis subsequently revealed that this pistol was the murder weapon. All the items were validly seized.

IV

Appellant also contends that a velvet shirt seized from a bedroom in his mother's house should have been suppressed because it was taken from a place where he had an immediate expectation of privacy without a search warrant and without his or his mother's permission.

The search of property without warrant but with proper consent voluntarily given is valid under the fourth amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). That requisite consent to search may be given by a third party who has joint access or control of the premises or effects sought to be searched. *United States v. Matlock*, 415 U.S. 164, 171 (1974); *State v. Williams*, 536 S.W.2d 947, 949 (Mo.App. 1976).

In the instant case, there was substantial evidence for the trial court to find that appellant lived with his mother and seven brothers and sisters in the house that was owned by his mother. She had not relinquished control over the bedroom and there was evidence that the bedroom was used by other members of the family because there were several beds and mattresses in the room. Appellant's mother clearly had concurrent authority over the part of the premises occupied by appellant to consent to its entry. Cf. *State v. Peterson*, 525 S.W.2d 599 (Mo.App. 1975). Appellant argues, however, that even if his mother could consent to the entry of the room, her consent was not voluntary.

Whether there was a voluntary consent is to be determined by the totality of the circumstances. *Schneckloth v. Bustamonte*, supra. That determination is dependent on

many factors including but not limited to the number of officers present, the degree to which they emphasized

their authority, whether weapons were displayed, whether the person was already in police custody, whether there was any fraud or misleading on the part of the officers, and the evidence as to what was said and done by the person consenting.

State v. Rush, 497 S.W.2d 213, 215 (Mo.App. 1973).

The evidence supports a finding that on Tuesday, August 21, the day before appellant's arrest, police officers went to the home of appellant's mother where appellant and his seven brothers and sisters also lived. Mrs. Blair answered the door and, when asked if appellant was in the house, said that he had not been there for a couple of days. The officers told Mrs. Blair that appellant was a suspect in a murder and asked her if they could enter the house and check for the victim's purse and other missing evidence. Mrs. Blair gave the officers permission to come in and directed them to a room on the second floor of the house which she said was appellant's bedroom. On entering the bedroom, they saw in plain view an orange or gold hooded shirt or sweater on a nightstand that matched the description of the clothing worn by the man who abducted Kathy Jo Allen. Mrs. Blair said that this shirt belonged to appellant, gave the officers permission to take it and accepted a written receipt for the seized item. The next day officers returned to Mrs. Blair's house and obtained a second consent to search, this time in writing, but no other evidence was found.

There was substantial evidence in the totality of the circumstances to find that Mrs. Blair voluntarily consented to the search. There were four police officers present when Mrs. Blair gave her consent, however, only two officers went inside. The officers were not hostile or demanding in making their request and did not otherwise emphasize their authority. No weapons of any kind were displayed, nor was Mrs. Blair in police custody, then or ever. The officers candidly admitted their reason for requesting entry into the house and, after they did so, Mrs. Blair not only gave them permission to come into the house but accompanied them upstairs and assisted them by pointing out appellant's room and identifying his clothing. The next day Mrs. Blair also gave her written consent to a search. Viewing all of the facts surrounding the giving of this consent, and the fact that the shirt, matching the description of the assailant's shirt, was in plain view where the officers had a right to be, was inadvertently discovered and identified by Mrs. Blair as appellant's clothing, the trial court did not err in overruling appellant's motion to suppress the velour shirt.

V

Appellant next urges that the trial court erred in excluding three venire persons who were not adamantly opposed to the death penalty in viola-

tion of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The three were part of sixteen jurors and as to all of them appellant alleges that exclusion of those prospective jurors opposed to the death penalty deprived him of a fair cross-section of the community guaranteed by the sixth and fourteenth amendments of the United States Constitution and resulted in a "death-qualified jury", i.e. one more prone to finding appellant guilty.

Excusing potential jurors for voicing general objections to the death penalty is error violative of constitutional standards. *Witherspoon v. Illinois*, *supra*. When prospective jurors, however, make it "unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them," *id.* at 522 n.21, they may be properly excluded. See *Davis v. Georgia*, 429 U.S. 122, 123 (1976); *State v. Newlon*, 327 S.W.2d 606, 615 (Mo. banc 1982); *State v. Mercer*, 618 S.W.2d 1, 6 (Mo. banc), *cert. denied*, 102 S.Ct. 432 (1981). In the instant case the three venire persons, Brown, Buddemeyer, and Ivory, were properly excused. The assistant prosecutor stated to the panel:

I will now ask you a question. I'll read it very slowly and, if you will give it your undivided attention, I want to ask you to respond to it when I'm through and, if there is any one of you who does not understand the question or wishes it to be re-read, please raise your hand.

Do you have any moral, conscientious or religious scruples which would make it impossible for you to bring in a verdict of death if you were convinced that such a verdict is fair and just?

MR. BELL [assistant prosecutor]:
And your name, ma'am?

VENIREPERSON LEONA M. BROWN: Leona Brown.

MR. BELL: And, Mrs. Brown, I'm not singling you out, and I'm saying this for the benefit of everyone who has thus far responded, but I want you to think very carefully. Is there any circumstance at all that you could ever assess the death penalty?

VENIREPERSON BROWN: I just don't feel like I could. I sure don't.

MR. BELL: Thank you, Mrs. Brown.

VENIREPERSON BROWN: All right.

MR. BELL: And your name, ma'am.

VENIREPERSON LUCILLE E. BUDDEMEYER: Lucille Buddemeyer. I feel the same way.

MR. BELL: Thank you.

Your name, sir?

VENIREPERSON CLESTER C. IVORY: I feel the same way. I don't think I could, no.

MR. BELL: I need that in more positive terms, sir.

VENIREPERSON IVORY: No, I couldn't.

MR. BELL: Thank you.

Again, out of an abundance of caution, to those

people who have just responded to this question, I ask you again to stop for just a moment and consider any-- and fantasize about any possible situation imaginable. Is there, under no circumstance, any situation in which you could assess the death penalty. Do the people, then, who have responded to this question and have indicated to the Court that they could not assess the death penalty maintain that position? Anyone who's changed their position?

Thank you.

The three venire persons made it "unmistakably clear" that they would vote "against the penalty of death regardless of the facts and circumstances that might emerge in the course of the trial". While they responded in terms of their feelings, they stated those feelings in unambiguous terms. *State v. Mercer*, 618 S.W.2d at 6-7, is controlling.

Appellant also challenges the excuse of all sixteen potential jurors opposed to the death penalty because their exclusion (1) deprived him of his right under the sixth and fourteenth amendments to trial by a jury drawn from a fair and representative cross-section of the community and (2) resulted in "death-qualified jury"--a jury more prone to finding appellant guilty. Both of these arguments have been raised previously and rejected. *State v. Mercer* 618 S.W.2d at 7-8; *State v. Mitchell*, 611 S.W.2d 223, 228-30 (Mo. banc 1981). In *Mercer* this Court stated:

The exclusion of those venire persons who have stated unambiguously that they cannot, under any circumstances, consider a certain punishment permissible under the law does not violate representative cross-section requirements of the sixth and fourteenth amendments. *Spenkelink v. Wainwright*, 578 F.2d 582, 597 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). The right to a representative jury does not include the right to be tried by jurors who have explicitly indicated an inability to follow the law. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

In *Witherspoon v. Illinois*, *supra*, 391 U.S. at 516, 88 S.Ct. at 1774, petitioners maintained that a jury selected in the manner present in that case, must necessarily be biased in favor of conviction citing two surveys in support. See *Witherspoon v. Illinois*, *supra* at 517, n.10, 88 S.Ct. at 1774, n.10. The Court found that the data presented was "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt," and declined to conclude that the "exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." *Id.* at 517-518, 88 S.Ct. at 1774-1775. The Court refused to reverse the conviction. See also *Bumpers v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

Following *Witherspoon v. Illinois*, *supra*, a number of studies were published on a theory that "death-quali-

fied" jurors are not impartial on the issue of guilt. These studies, however, are not conclusive, and this Court will not reverse defendant's conviction on the basis of the studies presented.

Those chosen to be jurors in no way indicated that they were biased for the prosecution or against the defendant; they indicated only that they would consider the death penalty if the law and facts permitted it. As stated in Spenkellink v. Wainwright, *supra* at 594:

[T]he veniremen indicated only that they would be willing to perform their civic obligation as jurors and obey the law. Such persons cannot accurately be branded prosecution-prone.

"A juror wholly unable to ever consider the death penalty no matter what the facts of a given case, would clearly be unable to follow the law . . . in assessing punishment." Adams v. Texas, . . . [448 U.S. 38, 44 (1980)]. The state has a legitimate interest in administering its death penalty statute which permits it to bar from jury service those whose belief about capital punishment would lead them to ignore the law. Adams v. Texas, *supra*. See also State v. Mitchell, *supra*.

618 S.W.2d at 7-8 (footnote omitted). The point is overruled.

VI

Next appellant argues that the trial court erred in not quashing the jury panel because the Jackson County juror selection system selectively excludes qualified jurors (blacks), thereby denying appellant's sixth and fourteenth amendment rights to a jury selected from a fair cross-section of the community.

In order to present a *prima facie* case of a fair cross-section (sixth amendment) violation, appellant must show that (1) the underrepresented or excluded group is a "distinctive" group in the community; (2) the representation of this group in jury venires as a whole is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to a systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364 (1979). Appellant argues that blacks comprise twenty percent of the population in Jackson County, and because Jackson County uses voter registration lists to select jury pools and blacks are underregistered as compared to whites, a distinctive group in the community is systematically excluded from jury venires as a whole.

Without expressing any opinion as to appellant's proof with respect to other prongs of the fair cross-section test, appellant only presents statistical evidence of the composition of his jury panel and petit jury. This is inadequate to show that the representation of this group in jury venires as

a whole is not fair and reasonable. As the Court stated in *Taylor v. Louisiana*, 419 U.S. 522 (1975):

[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition

Id. at 538 (citations omitted). Cf. *State v. Garrett*, 627 S.W.2d 635, 648 (Mo. banc 1982). Appellant also seems to assert that the prosecutor's peremptory strikes systematically excluded this distinctive group. As appellant stated in his brief:

In *Blair*, the jury panel consisted of ninety-seven (97) members, 17 of whom were black, 12 of whom were excluded on the issue of sequestration and *Witherspoon*. This left five jurors, one of which was struck by the defense since he indicated he knew defendant from his days as a volunteer parole officer and the remaining four were struck by the prosecution. The all white jury which tried this case could hardly be said to mirror the white/black population of this county.

Appellant has failed to establish that the state has repeatedly, in case of case, utilized its peremptory challenges to exclude blacks from juries and thereby failed to establish the systematic exclusion of blacks. *Swain v. Alabama*, 380 U.S. 202, 208 (1965). See also *State v. Bradford*, 462 S.W.2d 664, 671 (Mo. 1971); *State v. Ball*, 622 S.W.2d 285, 291 (Mo. App. 1981). The point is overruled.

VII

Appellant contends that the trial court erred in failing to grant mistrial or other relief when state witness Ernest Jones invoked the fifth amendment which foreclosed the defense from cross-examining the witness on matters material to the prosecution's case, thereby violating appellant's right of confrontation under the sixth and fourteenth amendments to the United States Constitution.

In this case, appellant's defense was that Ernest Jones was the murderer. As part of that defense, appellant introduced testimony that the murder weapon was in the possession of Jones at the time of the victim's murder. The state had introduced the handgun, seized at the apartment where appellant was arrested, that was identified by ballistic experts as being the murder weapon. Thus, ownership, possession, and control of the weapon at the time of the murder was material to the state's case and appellant's defense. The alleged error centers on Jones's refusal to answer on cross-examination whether he had stolen the murder weapon five years previously from his neighbor.

A defendant in criminal proceedings has a sixth-amendment right to confront adverse witnesses. *Pointer v. Texas*, 380 U.S. 400, 403, 406-07 (1965). And an essential interest secured by the right of confrontation is defendant's right of cross-examination. *Bruton v. United States*, 391 U.S. 123, 126 (1968); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). Nevertheless a state witness's invocation of his fifth-amendment right against self-incrimination during cross-examination does not per se violate a defendant's right to confront the witnesses against him and require striking of that testimony. As explained by this Court in *State v. Brown*, 549 S.W.2d 336 (Mo. banc 1977):

In 5 *Wigmore on Evidence*, sec. 1391, at 137 (Chadbourn Rev. 1974), the general applicable rule is stated as follows: "Where the witness, after his examination in chief on the stand, has refused to submit to cross-examination, the opportunity of thus probing and testing his statements has substantially failed, and his direct testimony should be struck out. On the circumstances of the case, the refusal or evasion of answers to one or more questions only need not lead to this result."

Id. at 341. This Court then adopted the rule in *United States v. Cardillo*, 316 F.2d 606, 611 (2d Cir.), cert. denied, 375 U.S. 822 (1963), with reference to when it is necessary to strike the testimony of a witness or a portion thereof if he invokes the fifth amendment. The Court in *Brown* found:

Cardillo distinguished questions which were proper cross-examination but collateral to the main inquiry such as those relating solely to the credibility of the witness or to prior criminal activity of the witness from questions directly relating to the participation of two of the defendants in the conspiracy for which they were being tried. . . . *Cardillo* pointed out that not every refusal to answer by a witness claiming his fifth-amendment rights requires the striking of his testimony or a part thereof, and stated at 613: ". . . There would appear to be at least three categories to be considered. The first would be one in which the answer would have been so closely related to the commission of the crime that the entire testimony of the witness should be stricken. The second would be a situation in which the subject matter of the testimony was connected solely with one phase of the case in which event a partial striking might suffice. The third would involve collateral matters or cumulative testimony concerning credibility which would not require a direction to strike and which could be handled (in a jury case) by the judge's charge if questions as to the weight to be ascribed to such testimony arose. As to the first and second categories suggested, whether all or a part of the testimony should be stricken, must depend upon the discretion of the trial judge exercised in the light of the particular circumstances."

It is seen from Cardillo and cases cited therein that courts must be acutely aware of a defendant's right to confront and cross-examine prosecution witnesses and to not permit that right to be diminished by recalcitrant witnesses who give damaging testimony on direct and then refuse to answer questions on cross which are closely related to the commission of the crime because those rights are constitutionally protected.

549 S.W.2d at 342-43 (emphasis added).

In the instant case, it is clear that appellant was not denied the right of cross-examination as to the possession of the murder weapon. Jones refused to answer only a single question relating to whether he might have possessed the gun five years earlier, and all other questions about the gun were answered. The subject matter about possession of the gun was thoroughly covered on cross-examination. The single question was not "closely related the commission of the crime" for which appellant was on trial or probative of possession of the weapon at the time of the murder. Jones had not waived any rights and properly invoked his right against self-incrimination about a matter relating to his commission of a crime. On these facts the Court hold that appellant was not prejudiced by the refusal of the witness to answer the singular question. The point is overruled.

VIII

Appellant's next assignment of error is that he was denied his sixth and fourteenth amendment rights to a fair trial and effective assistance of counsel because his former attorney, who represented appellant in a guilty plea which was offered by the state as proof of an aggravating circumstance, appeared and advised state's witness Ernest Jones to invoke the fifth amendment and refuse to answer questions during cross-examination. In essence, appellant contends that the representation of Jones by Mr. Sterling, a Jackson County public defender who had represented appellant on unrelated charges three and one-half years earlier, was a conflict of interest resulting in prejudice to appellant.

In January 1977, Sterling represented appellant when he pleaded guilty to attempted second-degree burglary and assault with intent to rob with malice. In September 1980, Sterling was appointed to represent Ernest Jones in connection with charges of first-degree assault and possession of a controlled substance, charges totally unrelated to the capital murder at issue. At the time of appellant's capital murder trial, the charges against Jones were still pending and Sterling appeared in court to represent Jones when he testified as a witness. Appellant objected to Mr. Sterling's appearance as a "conflict of interest", contending that (1) because Sterling had previously represented appellant, he should not advise Jones of his self-incrimination

rights; (2) the defense intended to call another member of the public defender's office as a defense witness; and (3) the defense might wish to call Mr. Sterling as a defense witness "to explain the circumstances surrounding Mr. Blair's former conviction if the state offers it in aggravation". The trial court appointed a second attorney to represent Jones for purpose of his testimony at appellant's trial. Mr. Sterling continued to represent Jones as to his pending assault and drug possession charges and remained in the courtroom. During Jones's cross-examination, Sterling twice advised his client not to answer. Appellant made no other objection to Sterling's representation until the day after Jones had completed his testimony, when he requested and was denied a mistrial on the conflict-of-interest grounds.

This is not a case where Jones and appellant were codefendants and Mr. Sterling represented both of them, where Sterling represented appellant the murder prosecution and Jones as a state's witness in the case, or where Sterling represented appellant in the first case and prosecuted him in the second. Cf. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *State v. Boyd*, 560 S.W.2d 296 (Mo.App. 1977); *State v. Johnson*, 549 S.W.2d 348 (Mo.App. 1977). During the trial Sterling represented only one client and one interest. His only duty was to protect the rights of Ernest Jones when he testified. Sterling did not represent the interests of appellant in the capital murder trial--his prior representation of appellant was totally unrelated to the capital murder trial. Even the charges for which he represented Jones were unrelated to the capital murder case. The Court holds that under these facts there was no conflict of interest or even an appearance of one. What appellant would have this Court find is that if an attorney represented a client in one case, the attorney would be forever barred from representing another person who might testify in a future, totally unrelated case against the former client. This the Court declines to do. The point is denied.

IX

In a related assignment of error, appellant argues that he was prevented from introducing mitigating evidence in the punishment phase of his trial in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution. His contention is twofold. First, appellant alleges that the trial court improperly submitted his prior convictions--attempted second-degree burglary and assault with intent to rob with malice as an aggravating circumstance because it was not authorized by § 565.012.2 evidence of "a person who has a substantial history of serious assaultive criminal convictions." Second, appellant argues that he was precluded from remedying this error by presenting evidence in mitigation because his former

attorney, who had represented state's witness Ernest Jones, was prevented from explaining the circumstances surrounding the convictions.

With respect to appellant's first argument, the trial court did not instruct the jury on the aggravating circumstance that "the offense was committed by a person who has a substantial history of serious assaultive criminal convictions". § 565.012.2(1). Nor was the circumstance of the prior convictions submitted as one of the "threshold" statutory aggravating circumstances which the jury had to find beyond a reasonable doubt before considering whether the death penalty was warranted "considering all the evidence". See *State v. Shaw*, _____ S.W.2d _____ (Mo. banc 1982) [No. 62679 handed down 8/2/82]. The "record of any prior criminal convictions and pleas of guilty" § 565.006.2, was submitted as an aggravating circumstance that the jury would have to find beyond a reasonable doubt when considering whether the imposition of death was warranted. Such a submission was an "aggravating circumstance otherwise authorized by law", § 565.012.1(3), and the judge "shall include [it] in his instructions to the jury". § 565.012.1. See *State v. Bolder*, _____ S.W.2d _____, _____ [slip op. at 12 & n.4, 13] [No. 62362 handed down 7/6/82] (Mo. banc 1982); MAI-CR2d 15.42, Note on Use 3. Nevertheless, this "aggravating circumstance" was not found by the jury and any possible error, of which there is none, would be harmless. *State v. Baker*, _____ S.W.2d _____, _____ (Mo. banc 1982) [slip op. at 8] [No. 63244 handed down 8/13/82].

Appellant also alleges that he was precluded from calling Sterling to testify about the circumstances surrounding appellant's two prior convictions because of Sterling's "conflict of interest" and because the judge ruled his testimony inadmissible. It should be noted initially that the judge never ruled that the evidence was inadmissible and that appellant could not call Sterling as a witness. While the trial court expressed doubts that such testimony would be admissible as retrying the prior convictions, it was unnecessary for the court to address the relevancy of the testimony until the witness was called. The only matter directly before the court was appellant's motion to direct a sentence of life imprisonment and objection to submit punishment to the jury because Sterling could not be called as a defense witness--a motion and objection the trial court denied. Nor was appellant prevented from calling Sterling as a witness because of a conflict of interest. See point VIII supra. Sterling, at the time, only represented Ernest Jones and did not at that time or ever represent the interests of appellant in the capital murder case. In addition, since Jones was not a party to the case and Sterling's anticipated testimony had no bearing on the pending charges against Jones, there was no conflict with his current representation that would have prevented him from testifying. Instead, as revealed by appellant's

brief, the decision not to call Sterling was a matter of trial strategy at the punishment phase.

In his brief, appellant contends:

Had the Court properly discharged this Counsel as requested by defendant's lawyers the defendant would not have been as concerned about the jury's opinion of their calling former Counsel Sterling as a witness in mitigation of the State's aggravating circumstance as alleged in Instruction #7.

Defendant's position is that the jury could not separate the legalistics of what happened in the courtroom with respect to Mr. Sterling advising Witness Jones to take the Fifth Amendment and would speculate that Witness Jones' answers could not only be prejudicial to himself but also to defendant Blair.

That decision of defense counsel cannot be attacked on appeal. The point is overruled.

X

Appellant complains that the evidence of his arrest on an unrelated murder and the fact he had been in the penitentiary for other crimes was evidence that the jury was instructed it could consider in its decision on punishment.

The evidence of appellant's prior convictions was properly before the jury during the punishment phase. See point IX supra. With respect to appellant's arrest for an unrelated murder, the only evidence of that fact before the jury was contained in appellant's confessions⁴ which were introduced during the guilt phase of the trial.⁵ In essence appellant argues that because the jury was instructed that it could "consider all of the evidence relating to the murder of Kathy Jo Allen" in deciding on the appropriate punishment, that the jury considered the arrest of appellant on an unrelated murder charge which was improperly introduced during the guilt portion of the trial.

"Prior to the admission into evidence of the confessions, there was

4. The disputed portion of the confessions was as follows:

I was released from the Missouri State Penitentiary on October 20, 1978. On July 19, of this year, I went into the Jackson County Jail for murder first. In the penitentiary I had the reputation of being able to hold my own and I wasn't afraid of anyone and I wasn't what they called a snitch.

5. Another reference to appellant's arrest for an unrelated murder was made by Ernest Jones during defense counsel's cross-examination of him at the guilt phase. Defense counsel objected. The trial court sustained the objection and instructed the jury to disregard the statement. The other reference occurred during appellant's cross-examination when he admitted the relevant passage was true.

discussion between counsel and the court as to whether the reference to the arrest was admissible. In holding that the whole confession was admissible, the court noted that the references to the arrest and time in the penitential were part of appellant's bragging to the police about his reputation and were relevant to his intent and motive, and related to the voluntariness of the statement because they indicated his state of mind at the time he gave the confessions, i.e., his confessions were not coerced by threats.

On matters of relevancy and materiality, the trial court has broad discretion and its decision should be overturned only if it abused that discretion. *State v. Wickizer*, 583 S.W.2d 519, 524 (Mo. banc 1979). It cannot be said that the court abused its discretion. Evidence of an arrest is ordinarily not admissible. In this case, the arrest was not admissible for the purpose of showing the arrest nor as bearing on appellant's propensity to commit violent acts. It was, however, part of the confession and related to why he thought Jackson selected him. The statement of appellant was part of his bragging about his reputation and reveals a partial motive in killing the victim to maintain that reputation, especially when he believed that Jackson approached him about "taking care of the girl" because of his reputation and when he recounted the crime to Ernest Jones and showed friends various items he had taken during the crime. "[E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive" *State v. Wing*, 455 S.W.2d 457, 464 (Mo. 1970), cert. denied, 400 U.S. 10 (1971). See also *State v. Mitchell*, 491 S.W.2d 292, 295 (Mo. banc 1973).

XI

This Court is required to review the sentence in capital murder cases when the death penalty is imposed. § 565.014.1. As required by statute

With regard to the sentence, the supreme court shall determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
- (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and
- (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

§ 565.014.3, RSMo 1978. Appellant's other contentions of legal error will be discussed in the context of this Court's statutory review of the punishment imposed.

The record contains no substantial evidence that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

In the presentence hearing, only the state presented evidence which consisted of appellant's two prior convictions. The jury was instructed on four statutory aggravating circumstances:

1. The defendant, Walter Blair, murdered Kathy Jo Allen for the purpose of receiving money or anything of monetary value, [§ 565.012.2(4)];
2. The defendant, Walter Blair, as an agent or employee of Larry Jackson and at his direction, murdered Kathy Jo Allen, [§ 565.012.2(6)];
3. The murder of Kathy Jo Allen involved torture and depravity of mind and that as a result thereof it was outrageously and wantonly vile and inhuman, [§ 565.012.2(7)]; and
4. The murder of Kathy Jo Allen was committed for the purposes of interfering with a lawful custody in a place of lawful confinement of Larry Jackson, [§ 565.012.2(10)].

The court also instructed the jury on these mitigating circumstances: "1. Whether the defendant has no significant history of prior criminal activity, [§ 565.012.3(1)]; and 2. the age of the defendant at the time of the offense [§ 565.012.3(7)]." The jury found beyond a reasonable doubt all four of the aggravating circumstances.

Appellant argues that the aggravating circumstances are facially invalid because they are unconstitutionally vague. Appellant only discusses the facial invalidity of the third aggravating circumstance, § 565.012.2(7). The others are straightforward and easily understood. With respect to the third aggravating circumstance, its facial validity has been upheld repeatedly. *Gregg v. Georgia*, 428 U.S. 153, 201 (1976); *State v. Newlon*, 627 S.W.2d 606, 621 (Mo. banc 1982); *State v. Mercer*, 618 S.W.2d 1, 10 n.4 (Mo. banc) (by implication), cert. denied, 102 S.Ct. 432 (1981). In accordance with these cases, we still find § 565.012.2(7) facially valid.

Appellant also contends that the evidence was insufficient to support each of the aggravating circumstances. From the evidence the jury could have found that appellant was approached by Larry Jackson in the Jackson County Jail. That appellant was offered \$2,000, an amount later raised to \$6,000, by Jackson to keep the girl from testifying, so that Jackson could avoid the rape charge. Appellant met with the Jackson family to make certain "the offer was for real". He kept the victim under surveillance and would have killed her and her boyfriend the night before the murder if he had had a gun. He stole a gun for the purpose of killing the victim. He made several statements to acquaintances that he was going to "take the girl out". He went to her apartment, abducted the victim, forced her to drive to a vacant lot, and then killed her. There is substantial evidence that appellant murdered the victim at the direction and as an agent of Jackson for the purpose of receiving money and to interfere with the lawful custody of Jackson on the

rape charge.

Specifically, appellant argues that the evidence was insufficient support a conclusion that "the murder of Kathy Jo Allen involved torture and depravity of mind and that as a result thereof it was outrageously and wantonly vile and inhuman", citing *Godfrey v. Georgia*, 446 U.S. 420 (1980).

Godfrey, however, rests on its unique facts. There, it was conceded defendant had not tortured the victims nor committed an aggravated battery upon them. Yet, the death sentence rested on the jury's finding that *Godfrey's* actions had been "outrageously or wantonly vile, horrible or inhuman in that (they) involved . . . depravity of mind." The Court rejected such conclusion as unconstitutional, noting several facts: *Godfrey's* victims were family members who had caused him "extreme emotional trauma"; that in an emotional state, he had killed them instantaneously; shortly after the killing *Godfrey* acknowledged involvement and the heinous nature of his crime and further, *Godfrey* had no criminal record. On these facts *Godfrey's* actions were deemed not to reflect "a consciousness materially more 'depraved' than that of any other person guilty of murder."

State v. Newlon, 627 S.W.2d at 621-22.

In the instant case, the facts are distinguishable from *Godfrey*. Kathy Jo Allen was the victim of a contract killing. It represents the ultimate in disregard for human life: the commission of murder purely for money. Appellant had thought about the killing for a long time. He stole a pistol for that purpose and had stalked the victim several days before the murder. Kathy Jo Allen had no quick death; she had substantial time to contemplate her fate. She was the subject of a terror campaign by telephone, in which appellant took part, to keep her from testifying in Jackson's rape trial. When appellant was in her apartment, Kathy "was crying. She was scared" She was then abducted from her apartment by appellant and forced to drive to a vacant lot. She repeatedly asked whether she was going to be killed. She somehow had her shirt removed. She was hit with a brick. She screamed and was shot twice at close range. Appellant, a convicted felon, recounted the murder to a friend, showed friends the items he had taken, and showed the Jackson family the victim's driver's license so that he could get paid. He demonstrated no remorse for his acts. The jury found appellant's acts outrageously or wantonly vile, horrible or inhuman and that the conduct resulted from appellant's depravity of mind. The evidence supports this finding.

This Court has compared the records of all capital cases in which the sentence was imposed after the effective date of our law, May 26, 1977. This Court has reviewed and affirmed five death sentences. *State v. Baker*,

S.W.2d

(Mo. banc 1982); *State v. Shaw*,

S.W.2d

(Mo.

banc 1982); State v. Bolder, _____ S.W.2d _____ (Mo. banc 1982); State v. Newlon, 627 S.W.2d 606 (Mo. banc 1982); State v. Mercer, 618 S.W.2d 1 (Mo. banc), cert. denied, 102 S.Ct. 432 (1981). One death sentence was reversed because of its disproportionality. State v. McIlvoy, 629 S.W.2d 333 (Mo. b 1982). In addition, this Court has affirmed the following capital cases in which the choice of death or life imprisonment without possibility of parole for fifty years was submitted to the jury: State v. Engleman, _____ S.W.2d _____ (Mo. 1982) (car bombing); State v. Greathouse, 627 S.W.2d 592 (Mo. 1982); State v. Bostic, 625 S.W.2d 128 (Mo. 1981); State v. Thomas, 625 S.W.2d 115 (Mo. 1981); State v. Emerson, 623 S.W.2d 252 (Mo. 1981); State v. Turner, 623 S.W.2d 4 (Mo. banc 1981), cert. denied, 102 S.Ct. 1982 (1982); State v. Jensen, 621 S.W.2d 263 (Mo. 1981); State v. Baskerville, 616 S.W.2d 839 (Mo. 1981); State v. Mitchell, 611 S.W.2d 223 (Mo. banc 1981); State v. Williams, 611 S.W.2d 26 (Mo. banc 1981); State v. Royal, 610 S.W.2d 946 (Mo. banc 1981); State v. Borden, 605 S.W.2d 88 (Mo. banc 1980); State v. Downs, 593 S.W.2d _____ (Mo. 1980).

Our determination whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases is based on a comparison of all the above cited cases and the entire record of the instant case. In considering the crime and the appellant, we find the penalty imposed neither excessive nor disproportionate. As stated previously, the facts surrounding this case represent a cold, calculated murder in which the victim was intentionally made to suffer extreme pain. This case presents not just contract killing, but a "murder for hire" to kill the victim of and sole witness to another crime (rape) to prevent her from testifying. Such a murder strikes at the heart of the administration of justice. A free and peaceful society is directly dependent on a justice system where disputes between the state and a person or between two people are resolved in courts under rules of law and not by violence in the streets.

It is seldom that a person intentionally becomes a witness to an event. It most often occurs by the happenstance of just being there. But when a person is a witness, as the victim or otherwise, that person becomes indispensable to the administration of justice. All other participants can be replaced by others, whether they be lawyers, judges, or jurors, but the witness cannot be replaced by anyone. Nor is it possible to give protection to a witness without completely removing the person from his ordinary daily life and confining or isolating the witness in some secret place. And that, from a practical standpoint, is simply impossible. Parties' rights to summon witnesses in their behalf is constitutionally protected. In short, a witness is the only person who, as an individual, is singularly indispensable to the fact-

administration of justice. The interference with the appearance of necessary witnesses in court and the killing of a witness to prevent the witness from testifying, as here, is absolutely intolerable. From the public standpoint it cuts the very heart out of a justice system necessary to maintenance of freedom. It is difficult to conceive of a crime more inimical to our society than the killing of a witness to prevent the witness from testifying. Prospective offenders who might consider killing a witness must be deterred. Such a purpose is served by imposing the death penalty. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). The General Assembly has recognized this fact and has since enacted the following statutory aggravating circumstance: "The capital murder was committed by the defendant for the purpose of preventing the person killed from testifying in any judicial proceeding." § 565.012.2(12), RSMo Cum. Supp. 1981. Considering the "crime", the death penalty is not excessive or disproportionate in this case.

While the crime in this case, as a contract killing, is similar to *State v. McIlvoy*, *supra*, the defendants are not. The circumstances surrounding this case fall far short of exhibiting any mitigating factors concerning the appellant. Appellant plotted a course to kill Kathy Jo Allen and carried out that plan by abducting her and killing her. On the day after he killed Kathy, appellant described the abduction and murder in detail to Ernest Jones and showed friends the loot obtained during the crime. He kept Kathy's driver's license until he had shown it to the Jackson family so he could be assured of getting paid. He boasted to police about his reputation of "being able to hold his own". No evidence exists that appellant was under the influence of drugs or alcohol at the time of the killing, or that he was of sub-normal intelligence.

Under all the circumstances, the death penalty was neither excessive nor disproportionate, considering the crime and the appellant, to the punishment imposed in similar cases.

The judgment is affirmed.

JOHN E. BARDGETT, Judge.

Donnelly, C.J., Rendlen, Welliver, Morgan, and Higgins, JJ., concur; Seiler, J., dissents in separate dissenting opinion filed. Execution date set for October 16, 1982.

AUG 31 1982

IN OFFICE OF
CLERK SUPREME COURT



Supreme Court of Missouri

en banc

STATE OF MISSOURI,

Respondent,

vs.

WALTER JUNIOR BLAIR,

Appellant.

No. 62782

DISSENTING OPINION

I respectfully dissent. The aggravating circumstance found by the jury that the murder was committed for the purpose of interfering with a lawful custody in place of lawful confinement of Larry Jackson is not supported by the evidence. The killing of the victim did not in any way affect or change the lawful custody of Larry Jackson, who was in jail on various charges, including murder and robbery of one Jerry W. Han, as well as alleged rape of Miss Allen. See State v. Jackson, 608 S.W.2d 420 (Mo. 1980). In my opinion the aggravating circumstance of interfering with lawful custody refers to interfering with present custody. The meaning of lawful custody is discussed at some length in State v. Trimble, ___ S.W.2d ___ (Mo. banc 1982), from which it is apparent that the custody under examination is present custody, not a future possibility. The only way that the killing of Miss Allen could have borne on the custody of Larry Jackson would be as to how it would affect the outcome of some future trial of Jackson for her alleged rape, and there is no way that can be determined at this point or at the time of the trial of defendant. Jackson could have been convicted of her rape even though she were dead. There may

have been a witness, or defendant may have confessed, or circumstantial evidence might be sufficient. On the other hand, Jackson might have been acquitted. We have no way of knowing, nor did the jury, whether Jackson's rape trial would have resulted in his being in lawful custody as a consequence thereof or not.

Jackson unquestionably was in lawful custody at the time Miss Allen was killed, Trimble, supra, and this was not changed or interfered with by her death.

The question of whether a death penalty can be upheld when one or more of the aggravating circumstances found by the jury is not in fact present remains to be seen. In Zant v. Stephens, ___ U.S. ___, (1982), the court asked the Georgia Supreme Court to answer the question of what premises of state law support the conclusion that a death sentence is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury. The court sent the case back for answer to this certified question despite the argument of the Georgia attorney general that the aggravating circumstances are merely a threshold factual determination the jury must make. The difficulty is that there is no way to tell whether the jury relied on the invalid circumstance and, hence, no way to determine whether the imposition of the death penalty was arbitrary and capricious.

We do not know how the Georgia Supreme Court or the United States Supreme Court will decide on this; and, in the meantime, we should not assume that invalidity of an aggravating circumstance found by the jury will be held to be immaterial.

Robert E. Seiler, Judge

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

vs.

WALTER JUNIOR BLAIR,

Appellant.

Case No. 62,782

MOTION FOR REHEARING

Now comes the Defendant, Walter Junior Blair, and moves this Court for a rehearing of his points on appeal for the reason that Appellant truly believes that the Court has overlooked material matters of fact and has misinterpreted the law in this cause. If Appellant's motion is granted, he requests leave to file a new brief and to raise and argue points not briefed when the appeal was originally submitted.

POINT 1

The Appellant earnestly believes that the Court has denied him due process of law and equal protection of law under the United States Constitution, Amendment XIV, and under the Missouri State Constitution of 1945 as amended. The Appellant claimed error when the trial court refused to offer an instruction on felony murder, denominated first-degree murder in Missouri at the close of all the evidence in his case. This point was raised in Appellant's brief on appeal and in his oral argument, Appellant relying on State vs. Gardner, 618 S.W.2d 40 (Mo. 1981), and State vs. Wilkerson, 616 S.W.2d 829 (Mo. banc 1981). These cases clearly and unequivocally stated that it was error to fail to give a first degree of murder instruction in a capital murder case.

The decisions in Wilkerson and Gardner were notably terse in their treatment of this question. Neither the State nor the Appellant argued any change in the status of law as of January 1, 1979 because neither the state nor the Appellant had any reason to suppose that this Court would consider the advent of the new criminal code to be an event which deprived the Appellant of rights which were accorded to several other Defendants in similar cases.

Indeed, the decision of the Supreme Court of Missouri, Division 2 in the case of State vs. Fuhr, 626 S.W.2d 379, devotes one paragraph to the proposition that the case would have to be reversed because a first-degree murder instruction was not given in a capital murder case when the evidence supported it. Note that this murder occurred on February 6, 1980. (ibid.)

The Courts of Missouri have applied the Wilkerson-Gardner rule to other situations of homicide. See State vs. Holland where Division 2 of this Court held that a first degree murder instruction was proper when the charge was capital murder and the death of the victim occurred on September 29, 1979. This was a companion case to State vs. Daugherty, 631 S.W.2d 637 (Mo. 1982) where Division 11 of this Court held also that although the Defendant was charged with capital murder, a first-degree murder instruction was appropriate and a conviction on first-degree murder was appropriate also. The Appellant reiterates that the death occurred after January 1, 1979. And also the decision in State vs. Donovan by Division 1 of the Supreme Court on April 6, 1982 (Mo. 62618) where the Defendant's conviction of first-degree murder was reversed because the Court held that it was error to fail to instruct on conventional second-degree murder and on second-degree felony murder.

In all of the cases cited above it would seem that different factual elements would have to be proved to support the conviction for the offense not charged in the indictment. And all of these cases involved homicides which occurred after January 1, 1979.

Thus, this Court has taken the action of denying Appellant's Point I based on its decision in State vs. Baker, decided approximately one week before the instant case. Furthermore, Appellant is required to examine State vs. Baker to obtain the rationale behind the Court's decision in his own case.

In the Baker case, the Court opines as follows:

"The 'Elements Test' requires that the lesser offense be established by proof of the same or less than all the facts required to prove the greater offense."

Citing State vs. Smith and Hodges 592 S.W.2d 165 (Mo. banc 1979).

In that case it is submitted that this Court came to an absurd conclusion. Namely, that trespass is not a lesser included offense of burglary in the second degree. In Smith and Hodges the Court framed the issue as whether the burglary statute included all the statutory elements of the trespass statute and stated that the trespass statute requires proof in the disjunctive of one of three elements. The third element was that the Defendant willfully entered or remained upon property where the property was a residential within a city, town or a village. This includes every geographical part of the state of Missouri. Thus, the Court not only did not say that the facts are required to be the same or less than the greater offense, but it also erroneously held that the elements of the trespass statute are different or greater than those in the burglary statute.

It is noteworthy that Judge Seiler who wrote the opinion in Smith and Hodges wrote the dissenting opinion in State vs. Holland where he made no mention of this so-called "Elements Test".

For the foregoing reasons, the Appellant contends that the Court had subjected him to an ex post facto law formulated by the judges of this Court and designed to deprive him of equal protection of laws as applied to other defendants before this Court. The Appellant earnestly contends that the Court ought to reconsider this point at a new hearing, as well as any other points which the Appellant briefs and argues before this Court.

POINT II

The Court erred in holding that the evidence was sufficient to support Aggravating circumstance #4 i.e. the murder of Kathy Jo Allen was committed for the purposes of interfering with a lawful custody in a place of lawful confinement of Larry Jackson (565.012.2(10) Mo. Rev. Statutes).

In its opinion of August 31, 1982, the Court inadvertently misinterpreted and overlooked the law and facts of this case by holding that there was sufficient evidence for the trial court to have submitted aggravating circumstance #4¹ and for the jury

likewise to have found beyond a reasonable doubt that defendant Blair was guilty of having committed the murder of Kathy Jo Allen for the purpose of interfering with the lawful custody in a place of lawful confinement of Larry Jackson (565.012.2(10) Mo. Rev. Statutes) MAI-CR-15.42.

At the time of Ms. Allen's death, Larry Jackson was an inmate of the Jackson County Jail where he was being held on various charges some of which related to Ms. Allen (rape) and some of which related to criminal activities having no relationship to Ms. Allen (murder & robbery). Moreover at the time of trial Larry Jackson had been transferred to the Missouri State Penitentiary having been found guilty of the offense of murder and robbery which bore no relationship to the charges involving Ms. Allen as a victim (rape) see State v. Jackson, 608 S.W.2d 420 (Mo. 1980).

At trial, there was no showing that the death of Ms. Allen was the prime cause of the non-prosecution of Jackson for her rape. Moreover, the record is silent as to how the jury could find the nexus between the death of Ms. Allen and Aggravating circumstance #4 i.e. that the murder of Kathy Jo Allen was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson.

In analyzing the custodial status of Larry Jackson and the Aggravating circumstances submitted to the jury in Blair, one must look not only as to whether or not there was sufficient evidence to find that the murder was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson, which appellant submits there is not, but also what is lawful custody under Missouri case law. That issue was resolved in State v. Trimble, ____ S.W.2d ____ (Mo. banc 1982) wherein it is apparent that lawful custody deals with present

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1. The murder of Kathy Jo Allen was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson.

custody not a future possibility.

Appellant would further submit that since there is lacking sufficient evidence by which a jury could find this aggravating circumstance as defined in Trimble, i.e. interference with lawful custody, 1) the jury should not have had this aggravating circumstance submitted to them, and 2) the finding of the jury that there is sufficient evidence beyond a reasonable doubt to find this circumstance is inconsistent with the evidence and Missouri law.

In oral argument, the appellant directed the court's attention to Zant v. Stephens, argued 2-24-82 wherein the United States Supreme Court had accepted a capital conviction (which originated in the State of Georgia) wherein the United States Court of Appeals for the Fifth Circuit had ordered habeas relief for the respondent holding that the invalid circumstance might have materially affected the jury's sentencing decision 631 F.2d 397.

The United States Supreme Court returned the Zant case to the Georgia Supreme Court requesting that Court answer the question of what premises of state law support the conclusion that a death sentence is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury.

In applying that logic to the aggravating circumstances submitted in Blair, appellant submits that one or more impermissible factors injected themselves into the sentencing determination. Those factors were:

(1) That the appellant's confession contained references to prior arrests for murder² (for which he was not convicted) and that the jury was constructed to take that evidence and all the evidence relating to the murder of Kathy Jo Allen into their decision of whether there existed a sufficient aggravating circumstance to warrant the imposition of death as punishment of the defendant Walter Blair. MAI 15.42.

2. The elements of Murder 1st Degree were injected into the State's case-in-chief when the Prosecuting Attorney read into evidence defendant's confession wherein he admitted to taking the girl and holding her until Larry Jackson went to court . . . and that during the course of the kidnapping she struggled with him for the gun and was killed by gunfire.

()

(2) That the aforementioned submission was neither an aggravating or non-aggravating circumstance under Chapter 565 et. seq. and that the jury was advised by Instruction ___ MAI 15.42 to consider this along with the other evidence in the case, if they found an aggravating circumstance, to determine if defendant Blair should be executed. (See Appendix A, Instruction MAI CR-15.42).

(3) That the submission of the defendant's arrest for murder as part of a determination for execution/non-execution coupled with the submission of his plea of guilty on a prior occasion mislead the jury into considering evidence that defendant had a substantial history of serious assaultive convictions and was not harmless error.

(4) That there was insufficient evidence under Missouri law to submit to the jury as an aggravating circumstance that defendant had murdered Kathy Jo Allen for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson. See State v. Trimble, ___ S.W.2d ___ (Mo. banc. 1982).

(5) That there was insufficient evidence for the jury to find beyond a reasonable doubt that the defendant had murdered Kathy Jo Allen for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson.

For the foregoing, appellant prays that the Court find that there were one or more material impermissible factors injected into the sentencing determination and therefore the validity of the statutory aggravating circumstances and death sentence as found by the jury should render the death sentence in this case invalid.

POINT III

The Court in its opinion of August 31, 1982, inadvertently misinterpreted and overlooked the law and facts of this case by holding that the evidence that the defendant had previously been arrested for murder was admissible to show defendant's motive.

The admission into evidence of the defendant's confession without excising those parts of the confession which revealed to the jury that the defendant had been in the Jackson County Jail for Murder 1st Degree was prejudicial error.

The evidence of the arrest for an unrelated murder was injected into the State's case-in-chief by the Prosecuting Attorney's reading the confession to the jury during the direct examination of Witness Clarence Luther. (T-1818) The Trial court and this Court have erroneously concluded that the arrest was admissible for showing motive. Appellant notes that this is purely speculative because the Court is here dealing with what may have been the motive of Larry Jackson and confuses and attributes a possible motive of Jackson as an exception to show an arrest of Appellant Blair.

As a general proposition, Missouri courts have long held that evidence of an arrest is not admissible unless it has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial. State v. Reese, 274 S.W.2d 304, 307 (banc 1954). The admission in the confession of an incarceration for murder was not part of one continuous transaction so interrelated that proof of the defendant's participation in the crime charged could not be made without a showing of the facts tending to establish his participation in the others. See State v. Shumate, 478 S.W.2d 328 (Mo. 1972).

Appellant maintains that a connected and intelligible statement of the transaction could be had absent the revelation of the murder incarceration. State v. Ward, 457 S.W.2d 701, 708 (Mo. 1970). This is not a situation where the admission were irreparable to the remainder of the confession. State v. Brown, 584 S.W.2d 413 (Mo. App. 1979).

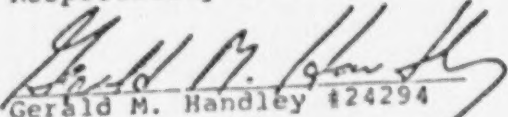
Moreover, since defendant's arrest for an unrelated murder was properly before the jury during the punishment phase (State v. Blair No. 62782 at pg. 21), the Trial court should have given a cautionary instruction with respect to the consideration by the jury of this prior arrest. See State v. Brown at 415.

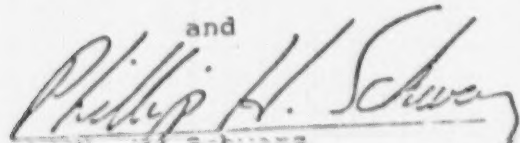
The admission into evidence of an unrelated arrest and then submitting it to the jury for its consideration in determining whether the defendant should be executed³ (MAI CR-15.42) absent a cautionary instruction was error which cannot be held harmless.

3. Upon a finding of an Aggravating Circumstance, MAI CR-15.42 permits the jury to use all of the evidence of the case (to include defendant's prior arrest for murder) in determining whether the defendant is to be executed.

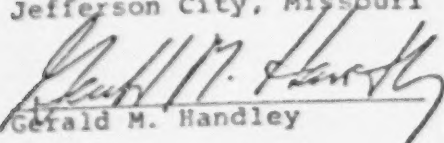
WHEREFORE, appellant respectfully requests this Court to grant a rehearing in this cause.

Respectfully submitted,


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and

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Attorneys for Appellant Blair

A copy of the above and foregoing motion was mailed, postage prepaid, on this 14th day of September, 1982 to:
Chief Counsel Preston Dean
Criminal Division
Office of the Attorney General
Supreme Court Building
Jefferson City, Missouri 65101


Gerald M. Handley

If you find and believe from the evidence beyond a reasonable doubt that one or more of the circumstances submitted in Instruction No. ____ exists and that at least one of them is an aggravating circumstance, it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of defendant. In deciding that question you may consider all of the evidence relating to the murder of Kathy Jo Allen.

You may also consider any of the aggravating circumstances referred to in Instruction No. _____ which you found beyond a reasonable doubt.

You may also consider the following circumstance if you find from the evidence beyond a reasonable doubt that it exists and that it is an aggravating circumstance.

1. That on January 26, 1977, the defendant plead guilty to Count I attempted burglary in the second degree and Count II assault with intent to rob with malice.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

vs.

WALTER JUNIOR BLAIR,

Appellant.

Case No. 62,782

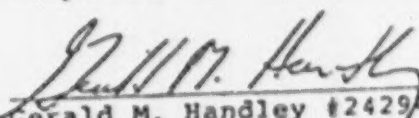
MOTION FOR STAY OF EXECUTION

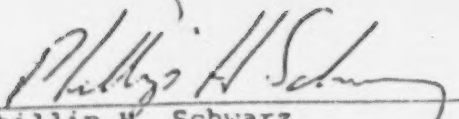
Comes Now Gerald M. Handley and Phillip H. Schwarz, attorneys for Defendant Walter Blair and respectfully move this Court for a Stay of Walter Blair's Execution set by this Court for October 16, 1982. In support of this Motion the following is asserted:

1. On August 31, 1982, the Supreme Court of the State of Missouri overruled Appellant's Appeal and set his execution for October 16, 1982.
2. On September 15th, 1982, defendant's Court appointed Counsel filed a Motion for Rehearing raising three points on his Motion for Rehearing.
3. The three points raised by Appellant in his Motion for Rehearing are all points which require analysis of existing case law, statutes and constitutional principles which would reasonably require additional briefing by Appellant and Respondent prior to the Court's decision on the Motion for Rehearing.
4. The interests of justice require that serious study be given to Appellant's Motion for Rehearing and that oral argument be given on the Motion and such interest mandate the staying of the execution date pending a resolution of those issues raised in Appellant's Motion.

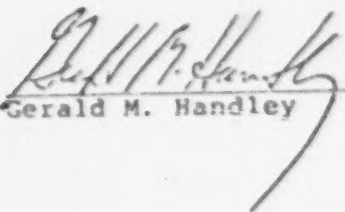
WHEREFORE, for good cause show Appellant respectfully moves this Court Stay the Execution date of October 16, 1982.

Respectfully submitted,


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Phillip H. Schwarz
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Attorneys for Appellant Blair

A copy of the above and foregoing
motion was mailed, postage prepaid,
on this 15th day of September, 1982, to:
Chief Counsel Preston Dean
Criminal Division
Office of the Attorney General
Supreme Court Building
Jefferson City, Missouri 65101


Gerald M. Handley

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

vs.

WALTER JUNIOR BLAIR,

Appellant.

Case No: 62,782

APPELLANT'S SUPPLEMENTAL MOTION FOR STAY OF EXECUTION

Coxes now Gerald N. Handley, Philip H. Schwarz, attorneys for defendant, Walter Junior Blair and move that issuance and execution of the order for execution in this cause be stayed pending the filing and determination of a timely petition for a Writ of Certiorari in the Supreme Court of the United States; or in the alternative, for a period of 45 days in which to apply to a Justice of the Supreme Court of the United States for a stay of execution pending the filing and determination of the timely petition for a Writ of Certiorari. In support of this Motion appellant and his attorneys reiterate and restate the matter contained in their Motion for a stay of execution submitted September 15, 1982, and state further:

1. Appellant will diligently prepare and file in the Supreme Court of the United States a timely petition for a Writ of Certiorari in this cause.


2. The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of the state of Missouri by a Writ of Certiorari is derived from Title 28, Section 1257(3) United States code, appellant having asserted before this Court the deprivation of rights secured by the Constitution of the United States.

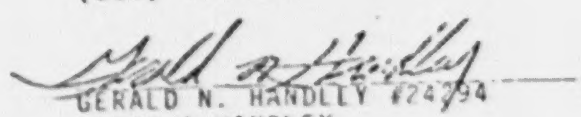
3. The appellant's application for a Writ of Certiorari will raise several substantial federal Constitutional questions.

4. Unless this stay is granted, the mandate of this Court will issue and appellant will be subject to execution on October 17, 1982 without having the opportunity to present to the Supreme Court of the United States those substantial Constitutional questions.

5. Under identical circumstances, this Court has in previous capital cases granted stays pending final disposition of certiorari petitions in the Supreme Court of the United States. See State vs. Mercer, 618 S.W. 2d 1 (Mo. banc 1981), and State vs. Martsay Bolder, Case No: 62362 in the Supreme Court of Missouri.

WHEREFORE the appellant prays the issuance of an order stating his execution date in this cause pending the filing and determination of a timely petition for Writ of Certiorari in the Supreme Court of the United States, or in the alternative, for a period of 45 days.


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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing motion was mailed, postage pre-paid, on this 10 day of September, 1982, to:

Chief Counsel
Preston Dean
Criminal Division
Office of the Attorney General
Supreme Court Building
Jefferson City, Missouri 65101


PHILIP H. SCHWARZ

No. 62782

Circuit Court No. CR79-1376

In the Supreme Court of Missouri

September Session, 1982

State of Missouri,

Respondent,

vs.

Walter Blair,

Appellant.

Now at this day, the Court has entered the following orders
in the above entitled cause:

"Appellant's motion for rehearing overruled."

"Appellant's motion for stay of execution overruled."

"Appellant's supplemental motion for stay of execution
overruled. Execution date re-set for October 28, 1982."

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1982, and on the 7th day of October 1982, in the above entitled cause.

Given under my hand and seal of said Court, at the City
of Jefferson, this 7th day of

October

Thomas F. Simon Clerk.
Mary Elizabeth McHoney D. C.
112

OCT 13 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

WALTER JUNIOR BLAIR,
Petitioner

v.

STATE OF MISSOURI,
Respondent

APPLICATION FOR STAY OF EXECUTION OF
A SENTENCE OF DEATH

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Counsel for Petitioner

Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

WALTER BLAIR,
Petitioner

v.

STATE OF MISSOURI,
Respondent

APPLICATION FOR STAY OF EXECUTION

To the Honorable Harry A. Blackmun, Associate Justice
of the Supreme Court of the United States and Circuit Justice
for the Eighth Circuit:

Petitioner, Walter Blair, prays that an order be
entered, pursuant to 28 U.S.C., Section 2101(f) and United
States Supreme Court Rule 44, staying the execution of his
death sentence scheduled for after sunrise on the 28th day
of October, 1982, pending a due application for, and a final
disposition in this Court of his Petition for Writ of
Certiorari. In support of this application, Petitioner
respectfully states:

1. At a jury trial in the Circuit Court of Jackson
County, Missouri, Petitioner was convicted of Capital Murder;
the jury found the existence of four aggravating circumstances
and recommended his punishment at death; judgment was entered
fixing his punishment at death.

2. This conviction was appealed to the Supreme Court
of the State of Missouri, briefed, and argued by counsel on
February 3rd, 1982.

3. By opinion dated August 31, 1982, in which Justice
Robert E. Seiler filed a dissent, Petitioner's conviction
and sentence was affirmed by the Supreme Court of the State
of Missouri. (Copy of the Opinion is annexed hereto as
Appendix "A".)

4. Petitioner's timely Motion for Rehearing filed September 15th, 1982, was denied by the Supreme Court of the State of Missouri on October 7, 1982. (Copy of said Order is annexed hereto as Appendix "B".)

5. On September 21, 1982, Petitioner filed a Motion in the Supreme Court of Missouri requesting the Court to stay issuance of its mandate pending final disposition of his Petition to this Court for Writ of Certiorari. On October 7, 1982, the Supreme Court of the State of Missouri denied the Motion. (Copy of said Order is included in Appendix "B".)

6. Absent the granting of a stay of execution by this Court, Petitioner will be executed and put to death on October 28, 1982, and a review of the judgment by this Court will be foreclosed to him forever.

7. The majority opinion of the Supreme Court of the State of Missouri affirming Petitioner's conviction and sentence denies asserted Federal constitutional claims as to which review in this Court will be sought on the grounds that they were decided in a way not in accord with applicable decisions of this Court. These issues include but are not limited to the following:

1) Whether the application of the "elements test" used by the Court for denying Petitioner an instruction on 1st degree Murder (Felony Murder) in a capital case (where there was evidence to support the giving of such instruction) amounted to a denial of due process of law, equal protection of law or was an application of an ex post facto law to Petitioner under the Fourteenth Amendment to the United States Constitution, since under like circumstances other defendants in Missouri were held to be entitled to instructions on Murder in the 1st degree in capital murder prosecutions pursuant to §565.001 and 565.008.1 (R.S.Mo. 1978) after January 1st, 1979. See State vs. Gardner, 618 S.W.2d 40 (Mo. 1981); State vs. Fuhr, 626 S.W.2d 379 (Mo. 1982);

State vs. Holland, S.W.2d (Mo. 1982); Beck vs. Alabama, 447 U.S. 625 (1980).

2) Whether or not there was sufficient evidence to support the finding of an aggravating circumstance, that the death of the victim was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of Larry Jackson (the party who allegedly hired Petitioner to commit the murder who at that time was serving a sentence on a separate conviction which bore no relationship to the victim) under §565.012.2(10) R.S.Mo. since under State vs. Trimble, S.W.2d (Mo. banc 1982) lawful custody means present custody and not future possibility.

3) What premise of Missouri law supports the proposition that a death sentence is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury viz., that the death of the victim was committed for the purpose of interfering with a lawful custody in a place of lawful confinement of another. Zant vs. Stephens, U.S. , 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982).

4) Whether the Petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution, by the improper introduction into evidence in his confession of an arrest for murder (for which Petitioner was not convicted) where the jury was instructed in the sentencing phase pursuant to M.A.I. - C.R.2d 15.42, to consider all of the evidence in the case in determining whether to execute Petitioner or sentence him to life without parole for fifty years.

5) Whether or not the application of Missouri's bifurcated sentencing process violated Petitioner's constitutional rights under the Sixth, Fifth and Fourteenth Amendments of the United States Constitution since the jury was permitted to consider this prior arrest for murder in determining whether to apply the death sentence.

6) Whether or not the system of selecting prospective jurors in Jackson County, Missouri by use of voter registration rolls as a sole source, denied the Petitioner his Sixth and Fourteenth Amendment rights under the United States Constitution to a jury selected from a fair cross-section of the community. See Duren vs. Missouri, 439 U.S. 357 (1979); Taylor vs. Louisiana, 419 U.S. 522 (1975); State vs. Larry Davis, WD33287.

7) Whether the exclusion of some jurors who are not adamantly opposed to the death penalty denied the Petitioner his Sixth and Fourteenth Amendment rights under the United States Constitution to a jury composed of a fair cross-section of the community and otherwise resulted in a "death qualified jury" which was more prone to a finding of guilt than an impartial jury.

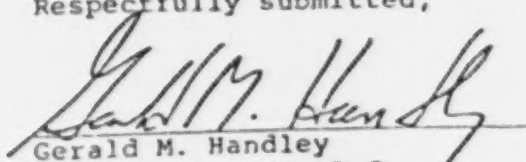
8) Whether or not the Petitioner's rights under the Fourth Amendment of the United States Constitution were violated by the law enforcement authorities seizure of this person and property without warrant or probable cause or any other duly recognized exception to the warrant requirement. See Steagald vs. United States, 101 S.Ct. 1642 (1981); Edwards vs. Arizona, 101 S.Ct. 1880 (1981).

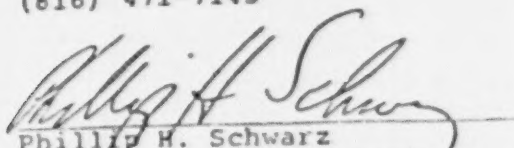
9) Whether or not the confessions taken from the Petitioner were the product of an illegal arrest under the Fourth and Fifth Amendments to the United States Constitution and were otherwise inadmissible in evidence as involuntary. Wong Sun vs. United States, 371 U.S. 471 486, 83 S.Ct. 407 416, 9 L.Ed.2d 441 (1963).

8. Petitioner is presently in the custody of the Warden of the Missouri Department of Corrections, Jefferson City, Missouri. A stay of execution would neither prejudice the State of Missouri nor interfere with Petitioner's custodial status, but is necessary to assure that Petitioner is not executed before this Court can determine the issues to be raised in his Petition for a Writ of Certiorari.

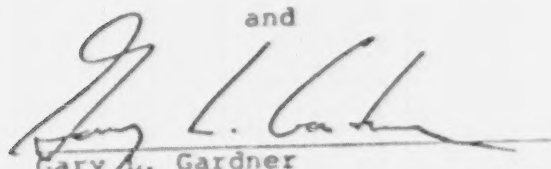
WHEREFORE, Petitioner respectfully requests an order staying his execution pending further order of this Court.

Respectfully submitted,


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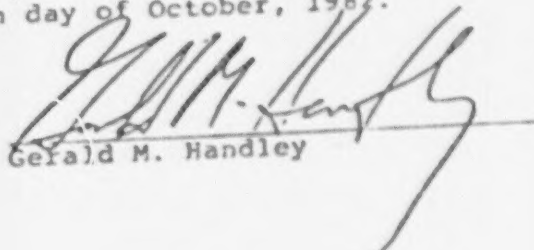

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was mailed, postage prepaid, to the Attorney General for the State of Missouri, John Ashcroft, at P.O. Box 899, Jefferson City, Missouri 65102, this 12th day of October, 1982.


Gerald M. Handley

Supreme Court of the United States

No. A-351

WALTER JUNIOR BLAIR

Petitioner,

v.

MISSOURI

ORDER

UPON CONSIDERATION of the application of counsel
for the petitioner,

IT IS ORDERED that the execution and enforcement of
the sentence of death imposed upon the petitioner and scheduled
for October 28, 1982, be, and the same is hereby, stayed pending
the timely filing and disposition by this Court of a petition
for a writ of certiorari. Should the petition for a writ of
certiorari be denied, this stay terminates automatically. In
the event the petition for a writ of certiorari is granted, this
stay shall continue pending the issuance of the mandate of this
Court.

/s/ Harry A. Blackmun

Associate Justice of the Supreme
Court of the United States

Dated this 14th
day of October, 1982.

United States Constitution, Article I, §10, clause 1 reads as follows:

No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

United States Constitution, Eighth Amendment, reads as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Constitution, Fourteenth Amendment, §1, reads as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of all the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 559.010, RSMo 1969, reads as follows:

559.010. Murder in the first degree

Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree.

Section 559.020, RSMo 1969, reads as follows:

559.020. Murder in the second degree

All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.

Section 556.220, RSMo 1969, reads as follows:

559.020. Accused convicted of offense of lower degree, when

Upon indictment for any offense consisting of different degrees, as prescribed by this law, the jury may find the accused not guilty of the offense charged in the indictment, and may find him guilty of any degree of such offense inferior to that charged in the indictment, or of an attempt to commit such offense, or any degree thereof; and any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide.

Section 559.005, RSMo Supp. 1975, reads as follows:

559.005. Capital murder defined

A person is guilty of capital murder if he unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of a human being.

Section 559.007, RSMo Supp. 1975, reads as follows:

559.007. First degree murder defined

The unlawful killing of a human being when committed without a premeditated intent to cause the death of a particular individual but when committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping is murder in the first degree.

Section 556.046.1(2), RSMo 1978, reads as follows:

556.046. Conviction of included offenses. -- 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when

(2) It is specifically denominated by statute as a lesser degree of the offense charged;

565.001, RSMo 1978, reads as follows:

565.001. Capital murder defined. -- Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

Section 565.003, RSMo 1978, reads as follows:

565.003. First degree murder defined. -- Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery burglary, or kidnapping.

Section 565.004, RSMo 1978, reads as follows:

565.004. Murder in the second degree. -- All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.

Section 565.008.1, RSMo 1978, reads as follows:

565.008. Death penalty, when imposed -- life imprisonment, when imposed-minimum of fifty years to be served, when -- first and second degree murder, penalties for. -- 1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

Section 491.050, RSMo Supp. 1982, reads as follows:

491.050. Convicts competent witnesses -- convictions and certain pleas may be proved to affect credibility. -- Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

Section 557.036.1, RSMo Supp. 1982, reads as follows:

557.036. Role of court and jury in sentencing-jury informed of penalties. -- 1. Subject to the limitation provided in subsection 3 upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.

Section 565.006.2, RSMo Supp. 1982, reads as follows:

565.006. Verdict as to guilty, when rendered-instructions by court, limitation -- presentence hearing, admissible evidence-penalty, when imposed-reversible error, effect. --

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge, at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment,

including the record of any prior criminal convictions and pleas of guilty, or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

Section 565.012.1, RSMo Supp. 1982, reads as follows:

565.012. Evidence to be considered in assessing punishment in capital murder cases. -- 1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence;

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence;

(3) Any mitigating or aggravating circumstances otherwise authorized by law; and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

Section 565.012.2, RSMo Supp. 1982, reads as follows:

565.012. Evidence to be considered in assessing punishment in capital murder cases. --

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by * means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

(11) The capital murder was committed while the defendant was engaged in the perpetration or in the attempt to perpetrate the felony of rape or forcible rape or the felony of sodomy or forcible sodomy;

(12) The capital murder was committed by the defendant for the purpose of preventing the person killed from testifying in any judicial proceeding.

Section 565.012.3, RSMo Supp. 1982, reads as follows:

565.012. Evidence to be considered in assessing punishment in capital murder cases. --

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

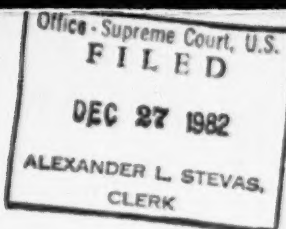
(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

No. 82-5834



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WALTER JUNIOR BLAIR,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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Attorney General

JOHN M. MORRIS III
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

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QUESTIONS PRESENTED

1. Whether the imposition of the death sentence upon petitioner constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution because of the trial court's refusal to give an instruction upon the lesser crime of first degree murder, where this crime was not a submissible "lesser included offense" under Missouri law and where the jury was instructed upon the lesser included offenses of second degree murder and manslaughter.

2. Whether petitioner may raise constitutional claims in this Court which were never properly presented to the Supreme Court of Missouri or any other state court.

TABLE OF AUTHORITIES

Cases Cited

<u>Beck v. Alabama</u> , 447 U.S. 625 (1980).....	2, 4
<u>Bouie v. City of Columbia</u> , 378 U.S. 347 (1964).....	5, 7
<u>Godfrey v. Georgia</u> , 446 U.S. 420 (1980).....	9, 10
<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976);	8, 9
<u>Hopper v. Evans</u> , ___ U.S. ___, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982).....	4
<u>Linkletter v. Walker</u> , 381 U.S. 618 (1965).....	7
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978).....	8
<u>Marks v. United States</u> , 430 U.S. 188 (1977).....	5
<u>People v. Smith</u> , 78 Ill.2d 298, 399 N.E.2d 1289, (1980).....	3
<u>Sandstrom v. Montana</u> , 442 U.S. 510 (1979).....	6, 8
<u>State v. Baker</u> , 636 S.W.2d 902 (Mo. banc 1982).....	3, 4, 6, 7
<u>State v. Blair</u> , 638 S.W.2d 739 (Mo. banc 1982).....	1, 8, 9
<u>State v. Bolder</u> , 635 S.W.2d 673 (Mo. banc 1982).....	5, 6
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STATEMENT OF THE CASE

Petitioner Walter Junior Blair was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the contract murder of Kathy Jo Allen, committed to prevent her from testifying against the person procuring the murder, who had previously raped her. The facts of this crime are extensively set out in the opinion of the Supreme Court of Missouri, State v. Blair, 638 S.W.2d 739, 743-746 (Mo. banc 1982), and will not be restated here.

The facts material to the consideration of petitioner's claims are as follows: at the submission of the present case to the jury in the guilt phase of trial, the jury was given verdict directing instructions on capital murder (the offense charged), conventional second degree murder and manslaughter. No instruction was given on the offense of first degree murder (felony-murder); under the decisional authority at the time of petitioner's trial, first degree murder was not a lesser included offense of capital murder. Following petitioner's conviction of capital murder, additional evidence was adduced by the state regarding petitioner's prior convictions. The jury imposed a sentence of death upon petitioner, finding as aggravating circumstances that (1) the victim was murdered for the purpose of receiving money or anything of material value, § 565.012.2(4), RSMo 1978; (2) the petitioner committed the murder as an agent of another, § 565.012.2(6); (3) the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind," § 565.012.2(7); and (4) the murder was committed for the purpose of interfering with the lawful custody of the procurer of the murder, § 565.012.2(10).

Of the four essential claims advanced by petitioner in his present petition, one (see part 1, infra) was properly raised in the state trial and appellate courts. Two others (parts 2 and 3, infra) were asserted for the first time in

petitioner's motion for rehearing after the issuance by the Missouri Supreme Court of its opinion affirming petitioner's conviction; under Missouri law, claims raised for the first time in a motion for rehearing are not reviewable by the appellate court. Petitioner's fourth contention (part 4, infra) has never been raised in any state court. Accordingly, only the first of these claims is properly reviewable in the petition at bar.

ARGUMENT

1. Submission of Lesser Offenses

Petitioner first contends that he was entitled, as a matter of federal constitutional law, to an instruction on the lesser offense of first degree murder. His only citation for this novel proposition is Beck v. Alabama, 447 U.S. 625 (1980). At petitioner's trial, the jury was instructed upon capital murder (the offense charged), conventional second degree murder and manslaughter.

Under the statutory and decisional law of Missouri, homicide is graduated into four classifications:

- (1) capital murder, § 565.001, RSMo 1978: murder with deliberation and premeditation;
- (2) first degree murder, § 565.003, RSMo 1978: murder in the course of certain enumerated felonies;
- (3) second degree murder, § 565.004, RSMo 1978: murder with premeditation (conventional second degree murder), or murder in the course of any non-enumerated felony (second degree felony-murder);¹ and
- (4) manslaughter, § 565.005, RSMo 1978: any unlawful killing.

¹For the decisional definition of second degree murder, see State v. Mannon, No. 63674 (Mo. banc August 31, 1982); State v. Franco, 544 S.W.2d 533, 535 (Mo. banc 1976), cert. denied 431 U.S. 957 (1977); State v. Jasper, 486 S.W.2d 268, 271 (Mo. banc 1972).

With regard to the submission to the jury of offenses other than that charged, the law of Missouri is well established: no such additional offense may be submitted unless (1) it is a "lesser included offense" of the crime charged; or (2) it is specifically designated by statute as a "lesser degree" of the charged offense. State v. Baker, 636 S.W.2d 902, 904 (Mo. banc 1982); § 556.046.1, RSMo 1978. To be a "lesser included offense," the statutory elements of the crime must be included within the offense charged--for example, conventional second degree murder (murder with premeditation) is a lesser included offense of capital murder (murder with deliberation and premeditation). See State v. Baker, supra, at 904; State v. Smith, 592 S.W.2d 165, 166 (Mo. banc 1979). This "statutory elements" test for lesser included offenses is the prevailing standard in numerous other jurisdictions.² Under these principles, it would have been erroneous and improper to instruct the jury on first degree murder in a capital murder prosecution:

"First degree murder in Missouri requires proof of commission of a felony; capital murder does not. Therefore, first degree murder is not a lesser included offense of capital murder on their elements. Nor can first degree murder be described as 'specifically denominated by statute as a lesser degree' of capital murder" (citation omitted). State v. Baker, supra, at 904.

Petitioner makes no attempt to dispute the above legal principles. Rather, he essentially argues (although he carefully avoids framing it in these terms) that the statutory elements test must be declared unconstitutional and instructions

²See, e.g., State v. Davis, 302 N. C. 370, 275 S.E.2d 491, 493 (1981); People v. Smith, 78 Ill.2d 298, 399 N.E.2d 1289, 1292 (1980); State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980); State v. Carter, 205 Neb. 407, 288 N.W.2d 35, 37 (1980); State v. Echevarrieta, 621 P.2d 709, 712 (Utah 1980); United States v. Bear Ribs, 562 F.2d 563, 564 (8th Cir. 1977), cert. denied, 434 U.S. 974 (1977).

given on any lesser offense which may be supported by the evidence--in this case, first degree murder. Petitioner cites no pertinent authority, and respondent is aware of none, which supports his theory. Beck v. Alabama, supra, cited by petitioner, is of no benefit to his claim. As noted by the Missouri Supreme Court,

"Beck requires that the trier of fact in a capital murder case be allowed to consider lesser included offenses supported by the evidence. Cf. Hopper v. Evans, ___ U.S. ___, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982). The Beck requirement prevents the jury from being in an 'all or nothing' situation in which it might err on the side of conviction. Although Beck is not precisely on point, due to the fact that first degree murder is not a lesser included offense of capital murder in Missouri, examination of the elements of the homicides, notably the mental states, illustrates that it is second degree murder, not first degree murder, which would sufficiently test a jury's belief of the crucial facts for a conviction of capital murder" (citations omitted). State v. Baker, supra, at 905.

The fallacy in petitioner's argument is illustrated by his statement that "[t]he State's evidence supported two theories of guilt, intentional murder and felony murder, but the trial court submitted only one theory--intentional murder" (petition at 8). Unquestionably, the state could have elected to prosecute this case on alternative theories of deliberated murder and murder in the course of an enumerated felony. However, the state did not elect to do so, and instead assumed the higher burden of proving that appellant intended to kill Kathy Jo Allen. It is absurd for petitioner to assert that he was constitutionally entitled to be prosecuted on all possible theories, or that his "due process" rights were violated because he was not.

2 "Ex Post Facto Law"

It is next claimed that the holding by the Missouri Supreme Court in State v. Baker, supra, that first degree murder was not a lesser included offense of capital murder, which decision issued after petitioner's conviction, constituted an ex post facto law under Article I, § 10 of the United States Constitution. Although the ex post facto clause applies only to enactments by legislatures, a similar limitation upon statutory construction by the judiciary has been implied as a matter of "due process." Marks v. United States, 430 U.S. 188, 191-192 (1977); Bouie v. City of Columbia, 378 U.S. 347, 352-355 (1964).

The principal difficulty with this "ex post facto" due process theory is that it has never been presented in any reviewable fashion to any state trial or appellate court. As petitioner himself confesses (petition at 5), his first effort to raise the present claim came in the motion for rehearing filed in the Missouri Supreme Court after the issuance by that court of the opinion in this case. Under long-established Missouri law, legal claims and theories are not properly reviewable when raised for the first time in motions for rehearing after the issuance of the opinion by the appellate court. State v. Bolder, 635 S.W.2d 673, 693 (Mo. banc 1982); State v. Oliver, 520 S.W.2d 99, 101-102 (Mo.App., Spr.D. 1975). As stated in Missouri Supreme Court Rule 84.17, "[t]he sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion." In light of these authorities, the present contention is not properly reviewable in the present petition. As this Court has noted,

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgement of a state court can arise only if the record as a whole shows either expressly or by clear implication

that the federal claim was adequately presented in the state system" (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 442 U.S. 510, 527 (1979). Since there is not the slightest indication from the Missouri Supreme Court's opinion that it reviewed petitioner's improperly-raised claims, cf. State v. Bolder, supra, at 693, it cannot be said that they were "adequately presented in the state system." See Street v. New York, 394 U.S. 576, 582 (1969).

In any event, petitioner's argument is factually meritless. His petition blatantly ignores the fact that the state decisional law in effect at the time of his trial clearly indicated that first degree murder was not a lesser included offense of capital murder. In State v. Handley, 585 S.W.2d 458 (Mo. 1979) (plurality opinion); and State v. Bradshaw, 593 S.W.2d 562 (Mo.App., W.D. 1979), it was held that conventional second degree murder was not a lesser included offense of first degree murder because the former required mental elements of intent while the latter required only the commission of a felony. State v. Handley, supra, at 462; State v. Bradshaw supra, at 565-566. A necessary implication from this conclusion, for precisely the same reason, is that first degree murder is not a lesser included offense of capital murder. See State v. Baker, supra, at 905. Petitioner's theory that decisions relating to the submission of lesser included offenses may only apply prospectively defeats his own argument: the first decision overruling Handley and Bradshaw and concluding that conventional and felony murder theories are not interchangeable came more than half a year after petitioner's trial. State v. Gardner, 618 S.W.2d 40 (Mo. 1981).

Even ignoring these facts, petitioner's argument states no colorable constitutional claim. Petitioner advances no authority, and respondent finds none, which has ever recognized a substantive constitutional right of "notice" regarding potential lesser included offense. To the contrary, it is manifest that the submission of lesser offenses is purely a

matter of procedure and has long been subject to change by decision, statute or court rule. The present issue is clearly distinguishable from that in Bouie v. City of Columbia, supra, cited by petitioner. In Bouie, the defendant was punished by a retroactive and unforeseeable expansion of a criminal statute, and thus was subjected to conviction without fair warning of the proscribed conduct. Id., 378 U.S. at 352-355. Nothing of the kind is present here: petitioner does not claim to be unaware that deliberated murder was criminal--he simply asserts that he should have received an additional "lesser offense" instruction. It has never been held, and it should not be held, that such a complaint rises to the level of constitutional "due process."

In addition to advancing his "due process" claim, petitioner asserts that his right to equal protection was violated because cases decided prior to State v. Baker, supra, which changed the law on the present issue, were treated differently from cases cited thereafter. No argument by respondent is required to reduce this claim to absurdity: according to petitioner's rationale, any change in the law which is not applied retroactively to all cases would violate equal protection. Such is obviously not the case. See Linkletter v. Walker, 381 U.S. 618, 622-635 (1965).

3. Evidence of Other Crimes.

Petitioner's third contention seems to be that the United States Constitution prohibits the trial jury from considering, at the punishment stage of trial, any evidence other than that specifically relating to the aggravating or mitigating circumstances submitted. Specifically, he asserts that the introduction of his prior convictions at the punishment stage was improper because these convictions were not an

element of the aggravating circumstances found by the jury.⁴

As with petitioner's previous contention (see part 2, supra), this claim is raised for the first time in this certiorari petition, having never been legitimately advanced in any state trial or appellate court. That being the case, it is not properly reviewable in this petition. Webb v. Webb, supra, at 496-497; Sandstrom v. Montana, supra, at 527.

In any case, petitioner's theory is directly contrary to the principle of individualized sentencing, repeatedly stated and emphasized by this Court. In Woodson v. North Carolina, 428 U.S. 280 (1976), for example, it is stated that

"the fundamental respect for humanity underlying the Eight Amendment...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death" (citation omitted). Id. at 304.

See also Gregg v. Georgia, 428 U.S. 153, 189 (1976); Lockett v. Ohio, 438 U.S. 586, 602-605 (1978). In light of this well-established policy, it is frivolous for petitioner to assert that the jury is limited to consideration of the aggravating circumstances submitted in the particular case. The sole function of aggravating circumstances is to limit and channel the discretion of the jury at the threshold of the capital sentencing determination. Gregg v. Georgia, supra, at 197-198; see State v. Shaw, 636 S.W.2d 667, 675 (Mo. banc 1982), cert. denied ___ U.S. ___, 103 S.Ct. 239 (1982). Once an aggravating circumstance is found, the jury's duty is to exercise its discretion in determining

⁴Petitioner also makes an obscure reference in his petition to evidence "that he had been arrested for an unrelated murder" (petition at ii, 15). The only evidence relating to this subject came during the guilt stage of trial and was admitted for the sole purpose of showing petitioner's motive and intent in committing the murder. See State v. Blair, 638 S.W.2d 739, 757 (Mo. banc 1982). Petitioner did not claim in any state proceeding that the introduction of evidence of other crimes is per se unconstitutional, and does not appear to do so in this petition.

whether the death penalty is appropriate.. Gregg v. Georgia, supra, at 197-198. In making this determination, it is not only proper but necessary that the jury have all possible facts before it which are relevant to the crime and the defendant, including the defendant's prior convictions, if any. Id. No possible merit is present in this point.

4. Validity of Aggravating Circumstance

Finally, petitioner contends that one of the four aggravating circumstances found by the jury in this case, that "[t]he capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another," § 565.012.2(10), RSMo 1978, was unconstitutionally vague as applied under the holding of this Court in Godfrey v. Georgia, 446 U.S. 420 (1980). The evidence in this case was that petitioner was hired by one Larry Jackson to murder the victim, Kathy Jo Allen, because she had previously been raped by Jackson and Jackson desired to prevent her from testifying against him. State v. Blair, supra, at 743-746.

As with his two previous claims of constitutional violations, petitioner did not bother to advance his current theory in the state courts; his only effort to attack the present aggravating circumstance was to claim that the evidence was insufficient to sustain it. See State v. Blair, supra at 758-759. Therefore, his present claim that § 565.012.2(10) is unconstitutional as applied is not subject to review in this petition. Webb v. Webb, supra, at 496-497.

Even were this issue to be reviewed, it presents no colorable constitutional issue. Petitioner's theory is that this aggravating circumstance is vague as applied because his attempt was not to interfere with Jackson's present custody (his incarceration on a charge of rape) but with his possible future custody (his imprisonment on a conviction of rape), and that this attempt might not have succeeded (petition at 16). In so arguing, he attempts to read into the language of the aggravating circumstance requirements which are

or custody involved

be a present arrest or custody, and that the attempt to prevent it must be successful. To the contrary, the language of § 565.012.2(10) could not be clearer or more unequivocal: the issue is whether the capital murder was committed for the purpose of interfering with an arrest or lawful custody. This requisite was clearly satisfied by the evidence in the present case. Cf Godfrey v. Georgia, supra.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WALTER JUNIOR BLAIR,
Petitioner,
v.
STATE OF MISSOURI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

SUPPLEMENTAL RESPONSE TO THE STATES
RESPONSE

WALTER JUNIOR BLAIR,
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1/

SUPPLEMENTAL RESPONSE TO THE STATES
RESPONSE

Comes now the petitioner and would inform this court that the states contention that the due process argument was not properly presented to the States Court (States Respondent, p. 5), is clearly erroneous, because there was a motion for rehearing pointing out that the courts decision violated the ex post facto prohibition in the Constitution:

1. It is established Missouri Law that when the Supreme Court commits error, they are the only ones with the record, and have jurisdiction to correct their error by recalling their mandate or granting a rehearing. SEE; SMITH V. WYRICK. 538 F.Supp. 1017 (W.D.MO. 1982), affirmed, ____ F.2d ____ (CA8 December, 1982), cert. pending, ____ US ____ (December, 1982).

2. Missouri has changed the procedures so much with respect to the Instructions on Murder that the petitioner has been denied due process of law:

A. Ex post facto law violation has been committed in this case. SEE: WEAVER V. GRAHAM. 101 S.Ct. (1981), wherein the United States Supreme Court held that due process of law is violated by applying a new rule of procedure to cases tried under the law.

B. In Boddie v. State of Conn., ____ US ____, ____ S.Ct. ____ this court held that due process is violated when a new rule is attempted to be applied to situations under the old law, the Boddie court totally rejected even a court of law making a new rule and applying the same to old cases.

C. Since the Missouri Supreme Court had full chance to meet the due process argument on the motion for rehearing, state remedies have been exhausted. SEE: State v. Zweifel, 615 SW2d 470 (Mo. App. 1981); SMITH V. WYRICK. supra.

D. In State Ex Rel. PEACH V. BLOOM. 576 SW2d (Mo. Banc), Missouri Court hold clearly that all cases must be tried under the procedural laws at the time of the offense.

WALTER JUNIOR BLAIR,
Pro se.

Walter Jr. Blair

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed this 31
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